Supreme Court, U.S.
FILED

97 • 526 SEP 24 1997

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No. _____

IN THE

Supreme Court Of The United States

October Term, 1997

MARLENA RAMALLO,

Petitioner,

vs.

JANET RENO, in her official capacity
and
DORIS MEISSNER, in her official capacity,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Richard L. Brusca,
Counsel of Record
Katharine S. Sexton
Benjamin B. Klubes
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for the Petitioner Marlena Ramallo

Balmar Legal Publishing, Washington, D.C.

119 pp

QUESTIONS PRESENTED

1. Whether the judicial review provision of the Immigration and Nationality Act ("INA"), as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), may retroactively apply and divest federal courts of jurisdiction over cases which: (a) require fact-finding and resolution of constitutional and other claims that are beyond the jurisdiction of the immigration courts; and (b) were pending before IIRIRA was enacted when Congress did not clearly manifest its intent to apply this provision retroactively.

2. Whether a court of appeals may vacate a presumptively valid decision of a federal district court as "akin" to moot when: (a) the court has no jurisdiction over the appeal; (b) the court and all parties expressly concede that the case is not moot; (c) the party obtaining the benefit from vacatur (i.e., the government) did not request or demonstrate its entitlement to this extraordinary equitable remedy; (d) the parties did not brief or argue the issue of vacatur; and (e) the court of appeals did not consider, much less find, that the prerequisites for vacatur on mootness grounds were satisfied.

PARTIES TO THE PROCEEDING

Petitioner, Marlena Ramallo, was the plaintiff in the district court and appellee in the court of appeals. Respondents, Janet Reno, in her official capacity and Doris Meissner, in her official capacity, were the defendants in the district court and appellants in the court of appeals.

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On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Marlena Ramallo, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in this case on May 27, 1997.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1) is reported at 114 F.3d 1210. The court of appeals' order denying the petition for rehearing (Pet. App. i0) is unreported. The court of appeals order granting petitioner's motion for a stay of mandate (Pet. App. 12) is unreported. The opinions of the district court (Pet. App. 14; 29; and 56) are reported at 918 F. Supp 11; 931 F. Supp 884; and 934 F. Supp. 1. The supplemental opinion of the district court on the government's motion for clarification (Pet. App. 59) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 27, 1997. A petition for rehearing was denied on August 8, 1997. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1994).

LEGAL PROVISIONS INVOLVED IN THIS CASE

U.S. CONST. amend. V.

8 U.S.C. § 1105(a) (amended April 1997) (judicial review provision prior to April 1997 amendment).

8 U.S.C.A. § 1252(g) (1997).

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 306(c), 1996 U.S.C.C.A.N. (110 Stat. 3009) 612.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(a), 1996 U.S.C.C.A.N. (110 Stat. 3009) 625.

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c), 1996 U.S.C.C.A.N. (110 Stat. 3009) 625-27.

These provisions are set forth at pages App. 84-89 of the Petitioner's Appendix.

STATEMENT OF THE CASE

Petitioner, Marlena Ramallo, the widow of Jack Kent Cooke, is a native of Bolivia who entered this Country in 1972 and became a lawful permanent resident in 1978. (Pet. App. 2). Ms. Ramallo has lived in this Country for twenty-five years. On September 25, 1995, Ms. Ramallo filed this civil action in the United States District Court for the District of Columbia seeking permanent injunctive relief and a declaratory judgment ordering the United States, through respondents Janet Reno and Doris Meissner (the "government"), to comply with its agreement to restore Ms. Ramallo's lawful permanent resident status. (Pet. App. 4, 19-20).

The lengthy history of the government's efforts to deport Ms. Ramallo without due process is not fully detailed herein, however, the following provides an overview of the case. In 1986, Ms. Ramallo pled guilty to the offense of conspiracy to distribute less than one kilogram of cocaine and agreed to cooperate with the government in its investigation of drug traffickers in exchange for the government's recommendation of a reduced or suspended sentence. (Pet. App. 15, 31). Ms. Ramallo maintains that neither the government nor her counsel informed her that her plea might cause her to lose her lawful permanent resident status. The sentencing judge, however, did not follow the government's recommendation and sentenced Ms. Ramallo to eighteen months in prison, of which she served five and one-half months. (Pet. App. 15, 31). When Ms. Ramallo was released from prison, the Immigration and Naturalization Service ("INS") issued an order to show cause charging her with deportability as a result of her plea. (Pet. App. 15).

Ms. Ramallo then sought relief from deportation pursuant to an INS procedure which may no longer remain available to her as a result of other recent amendments to the INA not

presently at issue in this case.[1] Among the evidence supporting Ms. Ramallo's application for relief from deportation was a letter from the United States Attorney's office for the Eastern District of Virginia attesting that she had provided valuable assistance to the government in its investigation of major drug traffickers. The letter also acknowledged that Ms. Ramallo had only a peripheral role in the conspiracy to which she had pled guilty and did not possess nor distribute any narcotics. In addition, Ms. Ramallo's mother, who died recently, was then living in the United States, as were other family members including her two sons, one of whom is a United States citizen.

At that time, however, other representatives of the government, in particular the Drug Enforcement Administration ("DEA"), wanted additional cooperation from Ms. Ramallo in its investigation and prosecution of drug traffickers. (Pet. App. 31, 37). Thus, the government had a strong interest in halting the waiver proceedings to ensure her cooperation because if Ms. Ramallo were to prevail on her waiver request, the government would have no bargaining power to obtain her cooperation and if Ms. Ramallo were to lose, she would be deported and no longer available to the government. Consequently, in the midst of the waiver proceedings, the government approached Ms. Ramallo and proposed an agreement whereby she would continue and expand her cooperation against members of the drug trade, consent to the entry of a deportation order and waive her right to appeal in exchange for, *inter alia*, the government's agreement that it subsequently would restore her lawful permanent resident status. (Pet. App. 58, 59). All of the witnesses below, including those currently employed by the

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[1] The constitutionality and other important federal questions concerning certain of these other amendments to the INA, contained in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), are the subject of a petition for a writ of certiorari on behalf of Dimitrios Katsoulis. *Yang v. INS*, 109 F.3d 1185 (7th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3157 (U.S. Aug. 12, 1997) (No. 97-279).

government, testified that Ms. Ramallo fully complied with her end of the bargain, including testifying in open court against major drug traffickers; she was responsible for approximately 30 convictions. (Pet. App. 32, 37, 40-41, 46). As a result of her cooperation, the government also concedes that her life is in grave danger from drug traffickers if she were deported back to Bolivia. (Pet. App. 40-41, 46).

Initially, the government complied with its agreement. For example, the government cancelled Ms. Ramallo's deportation bond and filed papers in 1992 asking the immigration judge to reopen her proceedings for the purpose of fulfilling the government's agreement to restore her lawful permanent resident status. (Pet. App. 41-43). Thereafter, however, the government reversed its position, breached its agreement, refused to restore her lawful permanent resident status, sought her deportation and vigorously opposed all efforts to obtain a full review of Ms. Ramallo's claims.

The complaint below, filed on September 25, 1995, set forth three claims for relief: (i) breach of contract and violation of the due process clause of the Fifth Amendment to the United States Constitution; (ii) promissory estoppel and violation of the due process clause of the Fifth Amendment to the United States Constitution; and (iii) equitable estoppel and violation of the due process clause of the Fifth Amendment to the United States Constitution. (Pet. App. 4, 33). Jurisdiction was asserted under 28 U.S.C. §§ 1331 and 1361 (1994).

The government initially moved to dismiss the complaint for lack of subject matter jurisdiction. (Pet. App. 34-35). The government contended that the action challenged the validity of a final order of deportation and therefore, under the exclusive jurisdiction provision of the Immigration and Nationality Act (the "INA") then in effect, could not be adjudicated by a federal district court. (Pet. App. 34-35). The government contended that the only court with jurisdiction over these claims was the United States Court of Appeals for the Fourth Circuit where Ms. Ramallo had filed a petition for review of an

order of the Board of Immigration Appeals (the "BIA").[2] (Pet. App. 34-35).

In an Opinion and Order filed on January 29, 1996, the district court, per Judge Richey, denied the government's motion to dismiss for lack of subject matter jurisdiction holding that it had jurisdiction over this action pursuant to 28 U.S.C. § 1331. (Pet. App. 14, 27). The district court held that the exclusive jurisdiction provision of the INA was not applicable to this action because it was an action to enforce a contract between Ms. Ramallo and the government -- not a challenge to the validity of a deportation order -- which required the government to undertake activities wholly outside administrative deportation proceedings, a fact which the government conceded on the record before an immigration judge. (Pet. App. 24-26).

On July 3, 1996, after the completion of discovery, briefing of cross-motions for summary judgment by the parties, and an evidentiary hearing, the district court found in favor of Ms. Ramallo and entered an order granting her relief. (Pet. App 56; *see also* Pet. App. 59). The district court found that Ms. Ramallo and the government had entered into an agreement that the government would restore her lawful permanent resident status in exchange for her cooperation with the government, including testimony, in its investigation and prosecution of dangerous drug traffickers. (Pet. App. 57-58, 59). The district court also found that the government

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[2] Significantly, the Fourth Circuit disagreed with the government, which had advanced the same argument in opposition to Ms. Ramallo's request for an abeyance of the proceedings on her petition for review. By Order dated November 7, 1995, the Fourth Circuit, per Judge Widener, granted the abeyance expressly for the purpose of permitting Ms. Ramallo to proceed with this case in the district court. (Pet. App. 63-64).

The BIA decision on review at the Fourth Circuit had dismissed Ms. Ramallo's appeal of an immigration judge order for lack of jurisdiction and held that it was "powerless" to enforce any agreement between the government and Ms. Ramallo to restore her lawful permanent resident status. (Pet. App. 78, 82).

promised, and led Ms. Ramallo to believe, it would restore her status after she testified against these drug traffickers and that Ms. Ramallo reasonably relied on that promise, fully complied with the agreement and cooperated with the government to her detriment. (Pet. App. 58). Therefore, in accordance with Ms. Ramallo's due process rights under the Fifth Amendment of the Constitution, the district court ordered specific performance by the government and also ordered that the government be estopped from denying the existence of the agreement. (Pet. App. 57-58). In an earlier opinion, the district court had explained:

> the public interest is furthered in ensuring that constitutional rights are upheld, that the government does not induce individuals to forfeit substantial rights in exchange for meaningless promises, and that persons in the American system of justice are encouraged to cooperate with the government.

(Pet. App. 51).

On September 4, 1997, the government filed an appeal with the Court of Appeals for the District of Columbia Circuit.[3] The government sought reversal of the district court's determinations that: (i) it had subject matter jurisdiction notwithstanding the INA's exclusive jurisdiction provision in effect in January 1996; and (ii) the government had agreed to restore Ms. Ramallo's lawful permanent resident status and was bound to honor that agreement. (Pet. App. 2). The government did not request the equitable remedy of vacatur, and that issue was not briefed by the parties.

On September 30, 1996, well after the district court entered its injunction, the President signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") which became effective on April 1, 1997.

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[3] Jurisdiction over the government's appeal was premised on 28 U.S.C. § 1291 (1994).

IIRIRA, *inter alia*, amended the exclusive jurisdiction provision of the INA to provide as follows:

> EXCLUSIVE JURISDICTION.--Except as provided in this section and notwithstanding any other provision of law, *no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].*

(Pet. App. 85) (emphasis added). The section of IIRIRA setting forth its applicability (Section 309(c)) states the "[g]eneral rule that new rules *do not apply*. . . [s]ubject to the *succeeding* provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of [April 1, 1997]." (Pet. App. 87) (emphasis added). The succeeding sections, however, do not refer to the amended exclusive jurisdiction provision. (Pet. App. 87-89). A *preceding* section, 306(c), states that the exclusive jurisdiction provision applies to "claims arising from all past, pending, or future exclusion, deportation, or removal proceedings." (Pet. App. 85-86).

On May 27, 1997, without reaching the merits of the appeal, the court of appeals held that IIRIRA's amendment to the exclusive jurisdiction provision of the INA divested it and all federal courts of jurisdiction because the case arose "from the decision or action of the Attorney General to execute a removal order against [Ms.] Ramallo." (Pet. App. 2-3, 5-6) (internal quotations omitted).

Notwithstanding its determination that it lacked jurisdiction over the case, the court of appeals nonetheless also found that it had "residual jurisdiction" to vacate the district court's orders because Congress intended to "clear the decks of pending cases covered by the new statute." (Pet. App. 3, 6). The court of appeals also stated that jurisdiction to vacate was appropriate "[i]n the peculiar circumstance of this case, [because the court's] jurisdiction is something akin to an appellate court's jurisdiction when a case becomes moot between the time a district court judgment is entered and the

time it arrives at the appellate court for review." (Pet. App. 6). On this basis, the court of appeals ordered that the district court's judgment be vacated and the case remanded with a direction to dismiss Ms. Ramallo's claim. (Pet. App. 8). In short, the court of appeals handed victory to the government without regard to the merits of its appeal, and it swept away the district court's injunction in deference to a belief that Congress intended to "clear the decks."

REASONS FOR GRANTING THE PETITION

This petition should be granted because it raises substantial and important federal and constitutional questions concerning the scope of federal court jurisdiction. Moreover, the court of appeals decision below conflicts with decisions of other courts of appeals, and with the decisions of this Court.

The court of appeals below held that recent revisions to the INA contained in IIRIRA (the exclusive jurisdiction provision codified at 8 U.S.C. § 1252(g) (1997)) barred federal court jurisdiction over pending cases even where they involved constitutional and other claims that are beyond the jurisdiction of the immigration courts. Therefore, the court of appeals' decision conflicts with the decision of the Ninth Circuit that federal courts retain jurisdiction over constitutional and other claims that are beyond the jurisdiction of the immigration courts. *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997), *reh'g requested*, Aug. 18, 1997. The court of appeals' decision below also conflicts with the decision of the Seventh Circuit that IIRIRA's amendments to the INA do not apply retroactively to pending cases except as set forth in transitional rules that do not include the exclusive jurisdiction provision at issue here. *Turkhan v. INS*, Nos. 95-3838, 97-2230, 1997 WL 458120 (7th Cir. Aug. 12, 1997). Furthermore, the decision of the court of appeals below also conflicts with this Court's "time-honored presumption" against retroactive legislation absent a clear manifestation of congressional intent to the contrary, *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871, 1876 (1997), and this Court's similar requirement that restricting access to

judicial review requires "clear and convincing" evidence of congressional intent to do so. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-92 (1991).

The court of appeals' finding that it had "residual jurisdiction" to vacate also warrants granting the petition because it so departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. In announcing this "residual jurisdiction," the court of appeals did not identify any supporting statutory authority or legislative history. Moreover, its decision to vacate because the case was "akin" to being moot meets none of the mandatory prerequisites for vacatur on account of mootness. Most notably, the court of appeals acknowledged that the case was not moot.

For all of these reasons, Ms. Ramallo respectfully petitions for a writ of certiorari to review the court of appeals' decision below.

A. The Decision Below Conflicts With The Ninth Circuit's Holding That Section 242(g) Does Not Bar Judicial Review Of Cases Like This One And Is Inconsistent With Decisions Of This Court.

The petition should be granted because a conflict exists between the decision of the court of appeals in this case and the decisions of the United States Court of Appeals for the Ninth Circuit, *American-Arab Anti-Discrimination Comm. v. Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997*), reh'g requested*, Aug. 18, 1997, and this Court. These conflicts involve important federal questions concerning the jurisdiction of the federal courts which should be resolved by this Court.

The court of appeals in this case held that it was "clear" that the newly amended, and purportedly retroactive, exclusive jurisdiction provision of the INA (Pet. App. 85) divested it of jurisdiction to review the district court's injunction enforcing Ms. Ramallo's rights to due process under the Fifth Amendment of the Constitution and requiring the government to restore Ms. Ramallo's lawful permanent resident status as it

had agreed. (Pet. App. 6). The court of appeals did not address the fact that the immigration courts concede that they have no jurisdiction over Ms. Ramallo's claims, or authority to specifically enforce an agreement with the government.

The United States Court of Appeals for the Ninth Circuit, however, held the exact opposite -- that this provision (Section 242(g)) does not bar judicial review where, as here, the case raises constitutional and other issues that are beyond the jurisdiction of the immigration courts. *American-Arab*, 119 F.3d at 1373.[4] In *American-Arab*, plaintiffs brought a selective enforcement claim and First Amendment challenge in connection with deportation proceedings. The Ninth Circuit held that the federal courts retained jurisdiction over these claims because no proper factual record could be developed in the administrative proceedings and plaintiffs would have no other forum for review of their claims. The Ninth Circuit stated that it was "guided by the well-established principle that where possible, jurisdiction-limiting statutes should be interpreted to preserve the authority of the courts to consider constitutional claims." *American-Arab*, 119 F.3d at 1372.[5]

The court of appeals decision below is in conflict with this Court's decisions that a statutory limitation on judicial review should not be found when no other forum exists to address procedural and constitutional claims. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 491-92 (1991). In this case, the BIA itself expressly admitted it is "powerless" to enforce the agreement alleged by petitioner. (Pet. App. 78).

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[4] Several district courts have reached the same conclusion. *See, e.g., Wang Zong Xiao v. Reno*, 963 F. Supp. 874, 875 (N.D. Cal. 1997); *Tefel v. Reno*, No. 97-0805 CIV, 1997 WL 414820 (S.D. Fla. June 24, 1997).

[5] The Ninth Circuit concluded that Section 242(f) only prohibited courts from enjoining or restraining deportation "other than with respect to the application of [deportation] provisions to an individual alien"; thus it permitted individual aliens to seek injunctive relief for constitutional claims. *Id.* at 1372-73.

Consequently, the federal courts are the only forum where an alien may fully develop the requisite factual record and obtain review of such claims.

The decision of the court of appeals below that IIRIRA's deprivation of jurisdiction "raises no constitutional problem" because, "as the Government concedes," habeas review remains available, conflicts with *McNary* and is unpersuasive in light of the Ninth Circuit's decision. (Pet. App. 7-8). The Ninth Circuit acknowledged that "[t]he limitations of the new statute on habeas relief remain unclear." *American-Arab*, 119 F.3d at 1374; *see also Ozoanya v. Reno*, 968 F. Supp. 1, 6 (D.D.C. 1997) (open question exists as to limitations IIRIRA placed on habeas review). Furthermore, at least two courts of appeals have held that IIRIRA "abolishes" habeas review pursuant to § 2241, "leaving only the constitutional writ, unaided by statute." *Yang v. INS*, 109 F.3d 1185, 1195 (7th Cir.) *petition for cert. filed*, 66 U.S.L.W. 3157 (U.S. Aug. 12, 1997) (No. 97-279); *Auguste v. Reno*, 118 F.3d 723, 725-26 (11th Cir. 1997) (Section 242(g) removes jurisdiction to review habeas petitions).

Moreover, contrary to the position it took in this case, the government apparently has argued in other cases that habeas does not remain available to review due process claims. *See, e.g., Jorge v. Hart*, No. 97 CIV 1119, 1997 WL 531309, at *1, *4 (S.D.N.Y. Aug. 28, 1997) (government argued that INA amendments divested jurisdiction over habeas petition alleging deprivation of due process); *see also Yesil v. Reno*, 958 F. Supp. 828, 830 (S.D.N.Y. 1997) ("[T]he Government maintains that legal permanent residents with long-standing ties to the United States may be deported without any right to seek judicial relief or intervention -- even if the deportation order is based on an erroneous interpretation of the law."). Thus, the decision below conflicts with *McNary* because it relies on an unspecified and unclear possibility of a habeas remedy for its holding that IIRIRA precludes judicial review of constitutional and other claims.

B. The Decision Below Conflicts With The Seventh Circuit's Holding That Section 242 Is Inapplicable To Pending Cases, And Decisions Of This Court Barring Retroactivity.

The petition should be granted because a conflict exists between the decision of the court of appeals in this case and the decision of the United States Court of Appeals for the Seventh Circuit, *Turkhan v. INS*, Nos. 95-3838, 97-2230, 1997 WL 458120 (7th Cir. Aug. 12, 1997), and decisions of this Court. These conflicts involve important federal questions concerning the jurisdiction of the federal courts which should be resolved by this Court.

IIRIRA expressly carved out pending cases from its application except for certain transitional rules that do not include Section 242(g). Specifically, Section 309(c) of IIRIRA provides:

> GENERAL RULE THAT NEW RULES DO NOT APPLY. -- Subject to the *succeeding* provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings [before] the title III--A effective date [April 1, 1997] --
>
> > (A) the amendments made by this subtitle shall not apply, and
> >
> > (B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(Pet. App. 87) (emphasis added). The amended exclusive jurisdiction provision, IIRIRA 306(g), *precedes*, Section 309(c). Therefore, the general rule that the IIRIRA amendments do not apply to pending cases precludes the application of the new exclusive jurisdiction provision to this case. Likewise, IIRIRA Section 306(c), stating that the new exclusive jurisdiction provision applies to "claims arising from all past, pending, or future exclusion, deportation, or removal proceedings," also *precedes* IIRIRA Section 309(c). (Pet. App. 86).

In *Turkhan*, which was decided after the decision below, the Seventh Circuit held that the IIRIRA amendments, including Section 242 which contains the exclusive jurisdiction provision at issue here, did not govern pending cases, except as expressly provided in the transitional rules contained in Section 309(c) of IIRIRA. *Turkhan*, 1997 WL 458120, at *2 & n.4. The decision of the court of appeals below conflicts with *Turkhan* because it applied the exclusive jurisdiction provision retroactively to a pending case without an analysis of whether it was appropriate to do so.

This *sub silentio* decision that the exclusive jurisdiction provision applies retroactively also conflicts with this Court's decisions, including two decisions issued after the decision below, one of which rejected retroactive application of a jurisdictional provision absent clear congressional intent to the contrary. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 117 S. Ct. 1871, 1876-77 (1997) (affirming the "time-honored presumption" against retroactive legislation unless Congress has "clearly manifested its intent to the contrary" or the statute does not have a genuinely retroactive effect); *see also Lindh v. Murphy*, 117 S. Ct. 2059, 2064 (1997) (Congress' failure to explicitly provide that Section 153 of the AEDPA applied to pending cases, while it did expressly provide that Section 154 would apply to pending cases, defeats any argument that Congress intended Section 153 retroactively to apply).

Judicial review authority is especially protected from limitation by inference. This Court requires "clear and convincing" evidence of congressional intent before a statute is construed to restrict access to judicial review. *Johnson v. Robison*, 415 U.S. 361, 373 (1974) (citing *Abbott Lab. v. Gardner*, 387 U.S. 136, 141 (1967)); *see also Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 36 (D.C. Cir. 1990) ("absent a clear statement to the contrary, legislation should not . . . be interpreted to oust a federal court's equitable power, or its jurisdiction over a present case") (citation omitted). In this case, given the internal inconsistency in the statute and specific transitional rules which do not apply here,

there is no clear congressional intent to apply the exclusive jurisdiction provision retroactively. Moreover, the provision would foreclose *all fora* for Ms. Ramallo's cause of action because the immigration courts have admitted they do not have jurisdiction over her claims. Therefore, the decision below conflicts with this Court's decisions in *Hughes* and *Johnson*.[6]

C. The Court Of Appeals Vacatur Order So Departed From The Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Supervisory Powers.

The petition should be granted because the court of appeals' *sua sponte* order vacating a presumptively valid federal district court decision based on the truly novel theories of "akin" to mootness and "residual jurisdiction," so departed from the accepted and usual course of judicial proceedings that an exercise of this Court's supervisory powers is warranted.

First, the appeals court based its so-called "residual jurisdiction" on its determination that Congress intended to "clear the decks" of such cases. (Pet. App. 2-3, 6-7). The court of appeals did not cite any statutory authority to support this jurisdiction and there is none in the statute's transitional rules for pending matters. *See* Section 309(c). (Pet. App. 87-89).

Likewise, the court of appeals did not cite any legislative history or other support for its view that Congress intended to give federal courts "residual jurisdiction" to "clear the decks." Moreover, even if the court correctly divined the intent of

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[6] Even if Section 242(g) were somehow deemed to apply retroactively, it simply does not cover this case. This case does not arise *"from the decision or action by the Attorney General to . . . execute removal orders against [petitioner]."* (Pet. App. 85). Rather, as the district court held, this case arises from a breach of contract and violations of the Fifth Amendment right to due process in connection with an agreement to restore lawful permanent resident status that was made outside of the administrative process and independent of any "decision or action" to execute a removal order. (Pet. App. 86).

Congress, its decision has cluttered the decks, not cleared them, by noting that petitioner may relitigate the case she already won before the district court as a habeas proceeding. Obviously, initiation of habeas proceedings based on the same claims and underlying facts that the district court already fully adjudicated will spawn redundant litigation and appellate review. It will not "clear the decks."

Moreover, even if such "residual jurisdiction" exists, the court of appeals erred in vacating the district court's judgment as "akin" to moot because vacatur in this case conflicts with the very decisions of this Court that the court of appeals purported to follow. First and foremost, the decision conflicts with this Court's decisions that vacatur on mootness grounds shall not be ordered absent a demonstration that the action is *entirely moot*. *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 (1936) (per curiam) (controversy must be entirely moot to set aside lower court order). Indeed, if a case involves moot and not moot issues, *only* the moot portions may be vacated. *Daingerfield Island Protective Soc'y v. Lujan*, 920 F.2d 32, 36-37 (D.C. Cir. 1990) (demonstrating mootness is a heavy burden and must be satisfied for each claim); *Reeve Aleutian Airways, Inc. v. United States*, 889 F.2d 1139, 1142-43 (D.C. Cir. 1989). In this case, the government never argued, much less met, its heavy burden of demonstrating that the case is moot. Indeed, the court of appeals did not find the case was moot; rather the court of appeals' suggestion that Ms. Ramallo could bring a habeas case to adjudicate her claims clearly demonstrates that the case is not moot.[7] (Pet. App. 7-8).

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[7] *See Los Angeles County v. Davis*, 440 U.S. 625, 631-33 (1979) (where rights of parties continue to be affected by a live controversy, and the party who prevailed below still needs the relief sought case is not moot); *Reeve*, 889 F.2d at 1142-43 (mootness requires that interim relief or events have completely and irrevocably eradicated effects of alleged violations; case not moot where agreement at issue still in effect and potential statutory violation remained).

Furthermore, the decision below conflicts with this Court's decisions requiring consideration of equitable factors governing whether the "extraordinary" remedy of vacatur should be granted. *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994); *see also National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 351 (D.C. Cir. 1997) (noting the "longstanding practice" to deny vacatur "so as to avoid unfairness to parties who prevailed in the lower court") (internal quotations omitted). As this Court has held, "'[j]udicial precedents are presumptively correct . . . and should stand unless a court concludes that the public interest would be served by a vacatur.'" *U.S. Bancorp*, 513 U.S. at 26 (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting)). It is manifestly unfair to Ms. Ramallo to vacate the presumptively valid decision of the only court which examined the merits of her claim, and found that there was an agreement between the United States Government and petitioner "that is entitled to respect under the Due Process Clause of the Constitution." (Pet. App. 54). This is especially so here because the decision of the court of appeals did not analyze the equitable requirements for vacatur.[8]

Given the uncontested evidence that Ms. Ramallo's life would be in grave danger were she deported to Bolivia -- into the hands of the drug lords whose trade she disrupted -- those equitable factors would strongly point against vacatur. Further, this also would send the message to aliens who may consider cooperating with law enforcement against international drug traffickers that once the prosecutor is finished with them, they will be deported into the arms of those against whom they have testified. The court of appeals decided that vacatur was

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[8] The absence of briefing and argument by the parties on this issue makes the vacatur order all the more troubling a departure from the accepted course of judicial procedure and fairness. *Cf. U.S. Bancorp*, 513 U.S. at 24; *see also Daingerfield*, 920 F.2d at 37 (mootness order vacated where issue was not briefed).

appropriate because it believed that Congress intended to "clear the decks." Such a result, however, is more "akin" to requiring aliens, without the benefit of judicial protection of their due process rights, to "walk the plank."

CONCLUSION

For the foregoing reasons, Ms. Ramallo respectfully petitions for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

Richard L. Brusca,
Counsel of Record
Katharine S. Sexton
Benjamin B. Klubes
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for the Petitioner
Marlena Ramallo

September 24, 1997

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United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5265

MARLENA RAMALLO,

APPELLEE

v.

JANET RENO,
IN HER OFFICIAL CAPACITY AS ATTORNEY GENERAL
AND DORIS MEISSNER, IN HER OFFICIAL CAPACITY
AS COMMISSIONER OF THE
IMMIGRATION AND NATURALIZATION SERVICE,

APPELLANTS

Argued April 3, 1997

Decided May 27, 1997

Appeal from the United States District Court
for the District of Columbia
(No. 95cv01851)

Philip D. Bartz, Deputy Assistant Attorney General, U.S. Department of Justice, argued the cause for appellants, with whom *Frank W. Hunger*, Assistant Attorney General, *Philemina M. Jones*, Assistant Director, *Michelle R. Slack*, and *Laura M. Friedman*, Attorneys, were on the briefs.

Richard L. Brusca argued the cause for appellee, with whom *Robert S. Bennett*, *Katharine S. Sexton*, and *Catharine A. Hartzenbusch* were on the brief.

Before: EDWARDS, *Chief Judge*, WALD and TATEL, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* EDWARDS.

EDWARDS, *Chief Judge*: Appellee Marlena Ramallo, a native of Bolivia, entered the United States in 1972; she became a lawful permanent resident in 1978. In August 1986, Ramallo pled guilty to conspiracy to import cocaine and thereafter served 5½ months in prison.

In November 1986, due to her criminal conviction, the Immigration and Naturalization Service ("INS") initiated deportation proceedings against Ramallo. During the course of these proceedings, the Government and Ramallo entered into an agreement, the terms of which are disputed. Ramallo claims that, in return for her cooperation in prosecuting drug traffickers and her waiver of objections to her deportability, the Government agreed not to deport her and to restore her status as a lawful permanent resident. In compliance with her understanding of the agreement, Ramallo withdrew her objection to deportability in the deportation proceedings. A deportation order was subsequently issued by an Immigration Judge. When the Government later attempted to execute the deportation order, Ramallo filed suit in the District Court for the District of Columbia, seeking enforcement of the agreement to restore her status as a lawful permanent resident. The District Court entered judgment in favor of Ramallo.

On appeal, the Government claims that, at the time it ruled on this case, the District Court had no jurisdiction to consider Ramallo's claims. Due to recent legislative developments, we need not decide this issue. Subsequent to the District Court's judgment, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), amending section 242 of the Immigration and Nationality Act ("INA"). The IIRIRA undisputably deprives both district courts and courts of appeals of jurisdiction to hear this case.

As it is clear that this court lacks appellate jurisdiction over the subject matter of this case, a question remains as to the continuing validity of the District Court's judgment. In other words, because this court has no authority to review a matter of the sort here in issue, does the judgment of the District Court stand immune to challenge? We think not. We

find that, in enacting the IIRIRA, Congress intended a pragmatic approach, leaving this court with residual jurisdiction to clear the decks of pending cases covered by the new statute. Accordingly, we find that IIRIRA grants us jurisdiction to vacate the District Court's judgment and remand with a direction to dismiss appellee's present claim before the court.

I. BACKGROUND

Appellee Marlena Ramallo, a native of Bolivia, came to the United States in 1972 and became a lawful permanent resident in 1978. Ramallo was arrested in 1986 and, on August 1, 1986, she pled guilty to conspiracy to import cocaine, in violation of 21 U.S.C. § 963. As part of a plea agreement, she agreed to cooperate with officials of the U.S. Attorney's Office and the Drug Enforcement Agency ("DEA") in their investigations of unlawful drug trafficking. Ramallo served 5½ months in prison on her drug conviction.

On November 21, 1986, the INS initiated proceedings to deport Ramallo, issuing an Order to Show Cause, in which it charged that Ramallo was subject to deportation due to her criminal conviction. Appellee's initial deportation hearing took place on February 25, 1987. After two continuances, Ramallo began to present evidence on April 6, 1988. After the April 6 hearing was adjourned, proceedings did not reconvene until May 10, 1988.

At the May 10 hearing, during a recess, an INS trial attorney, a DEA agent, Ramallo's attorney, and Ramallo met. At the meeting, the parties formed an agreement, the terms of which are now substantially disputed. The Government asserts that it agreed not to deport Ramallo for the period it would take for her to cooperate with law enforcement authorities; Ramallo contends that, in return for her cooperation, the Government agreed not to deport her at all and to restore her status as a lawful permanent resident. It is undisputed that, as a result of the meeting, Ramallo agreed (1) to cooperate with the DEA and the United States Attorney's Office in the investigation and prosecution of drug traffickers,

(2) to concede that she was subject to deportation, (3) to withdraw her application for a waiver of deportation pursuant to section 212(c) of the INA, and (4) to waive an appeal of the Immigration Judge's decision. That same day, after Ramallo withdrew her application for relief pursuant to section 212(c) of the INA, the Immigration Judge entered an order of deportation.

On February 10, 1992, the INS, on Ramallo's behalf, filed a motion to reopen the deportation proceedings. The Immigration Judge granted the motion to reopen and gave Ramallo one week to file an application for waiver of deportation under section 212(c) of the INA. Ramallo, however, did not file the necessary papers; on April 15, 1992, the Immigration Judge denied Ramallo's request for relief, citing lack of prosecution.

On May 1, 1992, Ramallo filed a notice of appeal with the Board of Immigration Appeals, contesting the April 15, 1992 order denying her request for relief. On March 10, 1994, the Board of Immigration Appeals dismissed Ramallo's case for want of jurisdiction, holding that trips made by Ramallo outside the United States after the issuance of the deportation order divested the Board of jurisdiction. Ramallo appealed the Board of Immigration Appeals' decision to the United States Court of Appeals for the Fourth Circuit. The case in the Fourth Circuit has been held in abeyance, pending the outcome of the instant action.

On September 25, 1995, Ramallo filed the instant action in the District Court, seeking to enforce the May 10 agreement. She alleged breach of contract, promissory and equitable estoppel, and violations of the Fifth Amendment. The INS moved for dismissal on the grounds that the District Court lacked subject matter jurisdiction to review a final deportation order, claiming that, pursuant to section 106(a) of the INA, review of such an order is within the exclusive jurisdiction of the courts of appeals. Both the INS and Ramallo moved for summary judgment. The District Court held that it was not reviewing a final deportation order and, thus, that it had jurisdiction. The trial court then denied both

motions for summary judgment, holding that an affidavit of an INS attorney created a genuine issue of material fact as to whether the Government, in the May 10 agreement, promised not to deport Ramallo and to restore her lawful permanent resident status in return for her cooperation with law enforcement authorities. The District Court later held an evidentiary hearing pursuant to Rules 43(e) and 52(a) of the Federal Rules of Civil Procedure to resolve the issue of whether the Government promised not to deport Ramallo. After taking testimony from the INS attorney, the District Court entered judgment in favor of appellee, finding that "[Ramallo] and the government, through its agents, servants and/or employees, entered into an agreement, in exchange for her testimony against numerous drug dealers, that she would not be deported and that she would be restored to her previous status as a Lawful Permanent Resident." *Ramallo v. Reno*, Civ. No. 95-01851 (July 23, 1996) at 1-2, *reprinted in* Joint Appendix 399-400.

II. ANALYSIS

If we accept Ramallo's argument that the action in District Court concerned an alleged contract between the Government and appellee--not a final deportation order--then, at the time it heard the instant action, the District Court may have had jurisdiction under 28 U.S.C. § 1331. The Government disputes this view, claiming that the case in District Court concerned the validity of a final deportation order and that, at the time the case was before the District Court, 8 U.S.C.§ 1105(a) vested exclusive jurisdiction to review a final deportation order in the courts of appeals.

We need not determine whether the District Court erred in finding that it had jurisdiction to proceed on the merits of Ramallo's claim. Subsequent to the District Court hearing the case, Congress enacted the IIRIRA, amending section 242 of the INA. IIRIRA now undisputably deprives both courts of appeals and district courts of jurisdiction to decide the instant action. Section 306(a) amends section 242 of the INA by adding the following provision:

> EXCLUSIVE JURISDICTION.--Except as provided in this section and notwithstanding any other provision of law, *no court shall have jurisdiction* to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

8 U.S.C. § 1252(g) (emphasis added). The instant action arises from "the decision or action" of the Attorney General to execute a removal order against Ramallo and, thus, falls squarely within the express terms of the newly amended Section 242.

As it is clear that we lack jurisdiction over the subject matter of the instant action, we are faced with the question of whether we must now allow the District Court's decision to stand. To hold that we lack jurisdiction to enter any order affecting the judgment of the District Court would create an anomalous situation: a judgment of the District Court, with respect to a matter over which it now has no jurisdiction to hear, would escape appellate review, because the newly amended section 242 took effect after the issuance of the decision in the District Court. We doubt that Congress meant to countenance such a result. Rather, given the firm command of 8 U.S.C. § 1252(g), we believe that Congress intended to afford this court residual jurisdiction to clear the decks of cases in which the District Court has entered judgment, but in which there can be no review by the Court of Appeals due to its lack of jurisdiction pursuant to IIRIRA.

In the peculiar circumstance of this case, our jurisdiction is something akin to an appellate court's jurisdiction when a case becomes moot between the time a district court judgment is entered and the time it arrives at the appellate court for review. In *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950), the Supreme Court held,

> The established practice of the Court in dealing with a civil case from a court in the federal system which

> has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267, to be "the duty of the appellate court." That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance. When that procedure is followed, the rights of all parties are preserved; none is prejudiced by a decision which in the statutory scheme was only preliminary.

Id. at 39-40 (footnote omitted); *see also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391 n.3 (1994) (holding that "mootness by happenstance provides sufficient reason to vacate"). Following this line of analysis, we hold that the IIRIRA does not strip us of the authority to vacate the District Court's judgment, which was preliminary, and to remand with a direction to dismiss.

IIRIRA's deprivation of jurisdiction raises no constitutional problem in this case. A statute that removes jurisdiction from all courts to vindicate *constitutional* rights poses serious constitutional objections. *See Bartlett v. Bowen*, 816 F.2d 695, 703 (D.C. Cir. 1987) ("In our view, a statutory provision precluding *all* judicial review of constitutional issues removes from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and deprives an individual of an independent forum for the adjudication of a claim of constitutional right.").[1]

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[1] *See also Webster v. Doe*, 486 U.S. 592 (1988), where the Court held:

> We emphasized in *Johnson v. Robison*, 415 U.S. 361 (1974), that where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear. *Id.*, at 373-74. In *Weinberger v. Salfi*, 422 U.S. 749 (1975), we reaffirmed that view. We require this heightened showing in part to avoid the "serious

However, we need not decide whether the IIRIRA has such an effect, or, if it does, whether it is constitutional, because, as the Government concedes, habeas review remains available to appellee to raise substantial constitutional questions. *Cf. Yang v. INS*, 109 F.3d 1185, 1196 (7th Cir. 1997) (holding that section 306(a) of the IIRIRA deprives courts of jurisdiction over statutory habeas claims but, of course, leaves constitutional habeas intact). Appellee thus retains the right to pursue claims of constitutional infirmity on habeas.

III. CONCLUSION

For the reasons stated above, we vacate the District Court's judgment and remand with a direction to dismiss appellee's present claim before the court.

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constitutional question" that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim. *See Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681, n.12 (1986).

Id. at 603.

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5265

Marlena Ramallo,

Appellee

v.

Janet Reno,
in her official capacity as Attorney General and Doris Meissner, in her official capacity as Commissioner of the Immigration and Naturalization Service,

Appellants

September Term, 1996

Filed May 27, 1997

ORDER

It is ORDERED, on the court's own motion, that the Clerk withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41(a). This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/ Eva Brown

Deputy Clerk/CO

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5265

Marlena Ramallo,

Appellee

v.

Janet Reno,
in her official capacity as Attorney General and Doris Meissner, in her official capacity as Commissioner of the Immigration and Naturalization Service,

Appellants

September Term, 1996

Filed August 8, 1997

BEFORE: Edwards, Chief Judge, Wald and Tatel, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed July 11, 1997, it is ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By:

/s/_____

Robert A. Bonner
Deputy Clerk

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5265

Marlena Ramallo,

Appellee

v.

Janet Reno,
in her official capacity as Attorney General
and Doris Meissner, in her official capacity as Commissioner
of the Immigration and Naturalization Service,

Appellants

September Term, 1996

Filed August 8, 1997

BEFORE: Edwards, Chief Judge; Wald, and Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellee's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/_____
Robert A. Bonner
Deputy Clerk

Circuit Judge Garland did not participate in this matter.

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5265

Marlena Ramallo,

Appellee

v.

Janet Reno,
in her official capacity as Attorney General and Doris Meissner, in her official capacity as Commissioner of the Immigration and Naturalization Service,

Appellants

September Term, 1996

Filed August 26, 1997

BEFORE: Edwards, Chief Judge, Wald and Tatel, Circuit Judges

ORDER

Upon consideration of appellee's Motion for Stay of Mandate, it is

ORDERED that the motion is granted. The Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/_____
Robert A. Bonner
Deputy Clerk

United States Court Of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5265

Marlena Ramallo,

Appellee

v.

Janet Reno,
in her official capacity as Attorney General and Doris Meissner, in her official capacity as Commissioner of the Immigration and Naturalization Service,

Appellants

September Term, 1996

Filed September 10, 1997

BEFORE: Edwards, Chief Judge, Wald and Tatel, Circuit Judges

ORDER

Upon consideration of appellants' opposition to the motion for stay of mandate, treated as a motion for reconsideration of the order of August 26, 1997, it is

ORDERED that the motion for reconsideration is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

/s/_____

Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 95-01851 (CRR)

Marlena Ramallo,

Plaintiff,

v.

Janet Reno, *et al.*,

Defendants.

Decided January 27, 1996

Filed January 29, 1996

APPEARANCES

FOR THE PLAINTIFF: Robert S. Bennett, Richard L. Brusca, and Katharine S. Sexton, Attorneys, Skadden, Arps, Slate, Meagher & Flom, Washington, DC.

FOR THE DEFENDANT: Michelle R. Slack, Attorney, Office of Immigration Litigation; Frank W. Hunger, Assistant Attorney General; Gary G. Grindler, Deputy Assistant Attorney General; Robert L. Bombaugh, Director, Office of Immigration Litigation; and Philemina McNeill Jones, Assistant Director, Office of Immigration Litigation; all of the United States Department of Justice, Washington, DC.

MEMORANDUM OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT COURT JUDGE

INTRODUCTION

Before the Court is the defendants' Motion to Dismiss for lack of subject matter jurisdiction, filed on December 8, 1995 in the above-captioned case, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. The plaintiff filed an Opposition thereto on December 22, 1995, to which the

Defendants Replied on January 5, 1996.[1] Upon careful consideration of the pleadings, the entire record herein, the law applicable thereto, and for the reasons set forth below, the Court shall deny the defendants' Motion to Dismiss. Furthermore, the Court shall set a schedule for the expeditious resolution of this case.

BACKGROUND

The Deportation Proceedings

The plaintiff in the above-captioned case is Marlena Ramallo Kent Cooke, a native and citizen of Bolivia. She initially entered the United States in 1972 as a nonimmigrant visitor, and became a lawful permanent resident in 1978. *See In re Cooke*, No. A20 619 534 (Bd. Imm. App. Mar. 10, 1994), at 1.

On August 1, 1986, the plaintiff pled guilty to the offense of conspiracy to distribute less than one kilogram of cocaine in violation of 21 U.S.C. § 963. In return for a reduced sentence, she agreed to cooperate with federal authorities in their investigation of a related drug-smuggling operation. The plaintiff was initially sentenced to serve 18 months incarceration, but her term was later modified, and she served 5-1/2 months in prison with a 2 year period of probation. *Id.*

In November 1986, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause in the plaintiff's case, charging her with deportability under section 241(a)(11) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1251(a) (11),[2] as a result of her criminal conviction.

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[1] On January 11, 1996, the plaintiff filed a Motion for Leave to File Surreply, to which the defendants filed an Opposition on January 18, 1996. The Court found the Surreply to be unnecessary and did not consider the Surreply for the purpose of deciding the extant Motion to Dismiss. Thus, the Court shall deny the plaintiff's Motion for Leave to File Surreply.

[2] Section 241(a)(11) is now section 241(a)(2)(B) of the INA, 8 U.S.C. § 1251(a)(2)(B), and reads:

Id. At a deportation hearing in April 1988, the plaintiff conceded deportability and applied for relief from deportation pursuant to section 212(c) of the INA. *Id.* Also at that hearing, the plaintiff denied that she had ever knowingly used, possessed, sold, or trafficked in cocaine, although she admitted that she had traveled to Rio de Janeiro, as alleged in her indictment, in the company of individuals who subsequently were convicted of importing cocaine. *Id.* at 2. The plaintiff testified that as a result of her conviction, she assisted government officials in this country in their apprehension of narcotics traffickers. *Id.* The Immigration Judge ("IJ") adjourned the proceedings so that the plaintiff could obtain the appearance of the federal officers with whom she had cooperated. *Id.*

When the hearing resumed in May 1988, the parties entered into an agreement concerning the plaintiff's case. An attorney for the INS stated that the plaintiff "is going to withdraw the requested relief under 212(c) and is prepared for an order of deportation from this Court and is also prepared to waive appeal on this case." *Id.* The INS agreed that the plaintiff "is not going to be taken into custody, . . . and that there is an agreement of all the parties that there will be an additional request made to the district director which is beyond the court's jurisdiction as far as the effect of the order of deportation." *Id.* Accordingly, the IJ entered an order on May 10, 1988 finding the respondent deportable and ordering her deported. *Id.* No appeal was taken from that order. *Id.*

On February 10, 1992, the INS moved to reopen the plaintiff's deportation proceedings, stating that, "in the time that has passed since the original order of deportation was entered, the [plaintiff] has been extremely helpful to the

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> Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable.

government of the United States and has provided critical information that has resulted in the successful prosecution of many drug-related cases in the Eastern District of Virginia." *Id.* at 3. The plaintiff's attorney joined in that motion and, in a decision dated February 20, 1992, the IJ reopened the plaintiff's deportation proceedings. *Id.* On March 17, 1992, the IJ gave the plaintiff's attorney one week to file a Form I-191 in support of the plaintiff's application for relief from deportation. The Form was not submitted, however, and on April 15, 1992, the IJ issued a decision denying the plaintiff's request for section 212(c) relief for lack of prosecution due to her failure to file the required Form. The IJ also denied the requested relief. finding that the plaintiff was not statutorily eligible following the cessation of her lawful permanent resident status when she did not appeal the May 10, 1988 deportation order. The plaintiff appealed from the April 15, 1992 decision of the IJ at the Board of Immigration Appeals ("Board"). *Id.*

The INS, which previously did not oppose reopening the plaintiff's deportation proceedings, changed its position on appeal based on information that the plaintiff made seven trips outside the United States between July 5, 1989 and March 29, 1992. The INS attorneys were "apparently unaware" of this information prior to the appeal. On the basis of this information, the INS attorneys moved to dismiss the plaintiff's appeal, contended that the plaintiff had "self-executed" the 1988 deportation order and, therefore, that reopening the proceedings was improper pursuant to section 106(c) of the INA. *Id.*[3]

The plaintiff raised a number of arguments on appeal. Most relevant to the instant action, the plaintiff argued that, at the time of the 1988 hearing, the INS and her former attorney

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[3] *See* 8 U.S.C. § 1101(g) (any alien ordered deported who has left the United States, shall be considered to have been deported in pursuance of law); 8 U.S.C § 1105a(c) (an order of deportation or of exclusion shall not be reviewed by any court if the alien has departed from the United States after the issuance of the order).

entered into an agreement whereby, in return for her withdrawal of her section 212(c) application and her acceptance of a final order or deportation, the INS would not enforce her deportation and would permit her to continue to remain in the United States in consideration for her assistance to government officials in their prosecution of drug traffickers. *Id.* at 5. The plaintiff submitted an affidavit of the attorney who represented her at the 1988 hearing. The attorney averred that it was his understanding that the INS, in return for the plaintiff's cooperation, would not enforce the plaintiff's deportation order, would permit her to travel outside the United States, would continue her bond, and would quash the deportation order at some future date. The plaintiff also submitted evidence, including correspondence and memoranda from the government substantiating her claim.[4] The plaintiff maintained that the INS should be estopped from seeking her deportation and that it should be required to honor its part of the agreement concerning her status. *Id.* The plaintiff also asserted a claim of ineffective assistance of her former attorney because, *inter alia*, he did not obtain a clear commitment in writing from the INS, nor did he timely submit her section 212(c) application. *Id.* at 6.

On March 10, 1994, the Board dismissed the plaintiff's case for want of jurisdiction. Specifically, the Board held that the plaintiff's departures from the United States subsequent to her order of deportation divested the Board of jurisdiction to consider any motion to reopen the deportation proceedings. *Id.* at 6. As for the alleged agreement not to enforce her departure, the Board stated that it was without the power to enforce such an agreement, even if one existed. *Id.* at 8. In that regard, the Board noted that the plaintiff's claim was similar to an estoppel defense, which the Board has held it is without authority to apply. On April 8, 1994, the plaintiff

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[4] The plaintiff asserts that she will face grave danger if she is deported to Bolivia -- into the waiting arms of the very criminal enterprises she disrupted. Plaint. Opp. at 3-4.

filed a petition for review of the Board's decision with the United States Court of Appeals for the Fourth Circuit. *See Cooke v. Immigration and Naturalization Service*, No. 94-1456 (4th Cir. filed Apr. 8, 1994). Deportation proceedings have been held in abeyance pending review by the Fourth Circuit. Def. Mot. to Dismiss at 3.

On May 10, 1994, the plaintiff moved to have the Fourth Circuit proceedings held in abeyance pending attempts to settle the case. The defendants did not object and negotiations commenced. Efforts at settlement continued unsuccessfully until September 28, 1995. Def. Mot. to Dismiss at 4.

The Instant Action

On September 28, 1995, the plaintiff filed the instant action in this Court, alleging violations of the plaintiff's Fifth Amendment rights, breach of contract, and promissory and equitable estoppel. The plaintiff asks this Court to accord her the following relief:

(1) an order declaring that the May 1988 agreement is a legal and binding obligation of the government;

(2) an order declaring the INS deportation order null and void;[5]

(3) specific enforcement of the agreement by permanently enjoining the government from taking any further action to deport the plaintiff or refuse her reentry into the United States to the extent the plaintiff travels abroad;

4) specific enforcement of the agreement by requiring the government to take any and all actions necessary to restore the plaintiff's status as a permanent resident of the United States; and

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[5] Since filing her Complaint, the plaintiff has asserted that her request to have the INS deportation order declared null and void is moot.

(5) an award of her costs, including attorneys' fees, incurred as a consequence of the defendants' breach of the agreement.

See Complaint at 23-24.

After filing the instant action, the plaintiff filed a motion to again hold the Fourth Circuit proceedings in abeyance, pending this Court's decision. The defendants vigorously opposed the plaintiff's Motion on the ground that the Fourth Circuit has exclusive jurisdiction over this case pursuant to section 106(a) of the INA. *See* Def. Mot. to Dismiss, Exh. 4, at 7. The Fourth Circuit granted the plaintiff's Motion to hold its proceedings in abeyance pending the outcome of the case in this Court. *See Cooke v. Immigration and Naturalization Serv.*, No. 94-1456 (4th Cir. Nov. 7, 1995) (Order). In a single-judge order, the Fourth Circuit opined:

> It appearing to me that at one time, at least, in the recent past the government had an agreement with Marlena Kent Cooke that she could apply for a waiver of deportation, or like provision for her to live in the United States, if she were helpful to the government in the prosecution of certain criminal cases. And it further appearing that she may well have, and probably has, lived up to her part of the agreement, but that the government now opposes a decision on the merits of her application for a waiver of deportation or provision to live in the United States, for some reason which is not clear to me. The said Marlena Kent Cooke has sued the government in the United States District Court for the District of Columbia, seeking to enforce the said agreement, in *Romallo v. Reno et al.* No. 1:95CV01851, and on that account seeks to have the proceedings in this case held in abeyance.
>
> I am of [the] opinion Marlena Kent Cook [sic] should be permitted to pursue her said case in the district court in the District of Columbia.

Id. at 2 (Widener, Jr., J.).

The defendants now move for dismissal on the basis that this Court lacks subject matter jurisdiction over the plaintiff's

Complaint. The defendants argue that the plaintiff's action here "seeks to review the validity of a matter on which her final order of deportation is contingent and requests relief inconsistent with a final order of deportation, which is within the exclusive jurisdiction of the court of appeals" under section 106(a) of the INA. Def. Mot. to Dismiss at 4. Furthermore, the defendants argue that the plaintiff's departure from the United States while under a final order of deportation "self-executed" the order of deportation and thereby removed this Court's jurisdiction over the order pursuant to section 106(c) of the INA. *Id.* at 4-5. In support of her Opposition to the Motion to Dismiss, the plaintiff asserts that this Court has jurisdiction over the claims alleged and the relief sought under 28 U.S.C. § 1331, notwithstanding the immigration context in which they arise. Plaint. Opp. at 9.

DISCUSSION

I. THE COURT HAS A DUTY TO ENSURE THAT IT HAS SUBJECT MATTER JURISDICTION OVER THE INSTANT ACTION

At the outset, the Court will address the parties' contentions regarding the Fourth Circuit's November 7, 1995 order, which held its proceedings in abeyance so that the plaintiff could pursue her case in this Court. The plaintiff argues that, since the same jurisdictional issue raised here was also raised by the defendants in opposition to the plaintiff's motion for abeyance in the Fourth Circuit, relitigation of that issue is precluded. In response, the defendants argue that the Fourth Circuit did not address the jurisdictional issue when it granted the plaintiff's request for abeyance. Furthermore, the defendants argue that the single-judge order issued by the Fourth Circuit should not be accorded preclusive or binding effect. *See* Fed. R. App. P. 27(c) ("a single judge may not dismiss or otherwise determine an appeal or other proceeding . . . [and orders] of a single judge may be reviewed by the court."); *Pioneer Properties, Inc. v. Martin*, 776 F.2d 888 (10th Cir. 1985) (single judge order has limited effect); *Thomson v. Merit Sys. Protection Bd.*, 772 F.2d 879 (Fed. Cir.

1985) (same); *Locke v. Allstate Ins. Co.*, 696 F.2d 1340 (11th Cir. 1983) (same).

Indeed, the government's opposition to the plaintiff's request for abeyance in the Fourth Circuit was premised on the very same jurisdictional argument the government levies before this Court. Therefore, it is fair to suppose that, in deciding to grant the plaintiff's motion for abeyance, the Fourth Circuit considered and ultimately rejected the defendants' position regarding jurisdiction. However, in its order, the Fourth Circuit did not articulate a ruling on jurisdiction; thus, one might also assume that the Fourth Circuit granted a stay for prudential or other reasons. In any event, it is the duty of this and every Court to determine whether it has subject matter jurisdiction over an action before it. *See* Fed. R. Civ. P. 12(h) (3) ("*Whenever* it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") (emphasis added); *accord Market St. Assocs. Ltd. Partnership v. Frey*, 941 F.2d 588, 590 (7th Cir. 1991) (bench and bar have "nondelegable duty to police the limits of federal jurisdiction with meticulous care"). Thus, without attempting to interpret the Fourth Circuit's order beyond the fact that it granted a stay, the Court will proceed to determine the question of its jurisdiction.

II. THE PROVISIONS OF SECTION 106(a) OF THE INA ARE INAPPLICABLE TO THE PRESENT ACTION; THE COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 31 U.S.C. § 1331.

Section 106(a) of the INA provides that the courts of appeals shall have exclusive jurisdiction to review all final orders of deportation made against aliens pursuant to administrative deportation proceedings under section 1252(b) and 1252a of Title 8 of the United States Code. However, when section 106(a) is inapplicable, an alien's remedies ordinarily lie first in an action brought in an appropriate district court. *Cheng Fan Kwok v. Immigration and Naturalization Serv.*, 392 U.S. 206, 210 (1968).

Although they take issue with its terms and legal effect, the defendants do not dispute that an agreement was made with the plaintiff. The defendants argue that, because section 106(a) grants exclusive authority to the Courts of Appeals to review all final orders of deportation, this Court is divested of jurisdiction to review the agreement since specific enforcement of the agreement would affect the plaintiff's final order of deportation. The defendants also assert that the terms of the alleged agreement were examined and denied by the Board when it considered the plaintiff's motion to reopen and, thus, that "relitigation" of the agreement is barred by collateral estoppel. Def. Mot. to Dismiss at 5 & n.4.

The defendants' argument that the terms of the agreement were examined and denied by the Board is somewhat disingenuous. The Board dismissed the plaintiff's appeal for want of jurisdiction and further determined that it lacked jurisdiction over the alleged agreement between the plaintiff and the government; whatever statements the Board may have expressed concerning the terms and effect of the agreement were dicta and, therefore, the plaintiff cannot be estopped from pursuing her claims concerning the agreement. *See Yamaha Corp. of America v. United States*, 961 F.2d 245, 254 (D.C. Cir. 1992) (issue must be "actually and necessarily determined"

to create collateral estoppel bar in subsequent litigation), *cert. denied*, __ U.S. __, 113 S. Ct. 1044 (1993).

The Supreme Court has squarely rejected the notion that section 106(a) embraces all determinations directly affecting the execution of the basic deportation order. *See Chen Fan Kwok*, 392 U.S. at 213 ("If . . . 106(a) embraces all determinations 'directly affecting the execution of' an final deportation order, Congress has selected language remarkably inapposite for its purpose."). Rather, "[t]reating the statutory language and legislative history of Section 106(a) and its character as a jurisdictional provision, the Court concluded 'that Congress quite deliberately restricted the application of 106(a) to orders entered during proceedings conducted under 242(b), or directly challenging deportation orders themselves.'" *Butterfield v. Immigration and Naturalization Serv.*, 409 F.2d 170, 173 (D.C. Cir. 1968) (quoting *Chen Fan Kwok*, 392 U.S. at 215). The Court "accordingly held 'that the judicial review provisions of 106(a) embrace only those determinations made during a proceeding conducted under 242(b), including those determinations made incident to a motion to reopen such proceedings.'" *Id.* (quoting *Chen Fan Kwok*, 392 U.S. at 216); *see also Foti v. Immigration and Naturalization Serv.*, 375 U.S. 217 (1963) (courts of appeals have initial, exclusive jurisdiction under 106(a) to review discretionary determination of the Attorney General relating to the suspension of deportation). For the purposes of section 106(a), the term "final orders" includes "all matters on which the validity of the final order is contingent." *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 938 (1983).

Here, the plaintiff's Complaint does not challenge the validity of the deportation order or a determination made in the deportation proceedings. Her direct challenge of the deportation order is the subject of her action with the Court of Appeals for the Fourth Circuit. Rather, the plaintiff alleges breach of an agreement and violation of her Fifth Amendment rights due to the alleged breach. The plaintiff seeks specific enforcement of the agreement, by which the government allegedly is obligated to ensure that the plaintiff may remain in this country, regardless of a finding of deportability or an

order of deportation and independent of the administrative deportation proceedings. In this regard, the Court notes that at a deportation hearing, the defendants expressly acknowledged the existence of an agreement "that there [would] be an additional request made to the district director which is beyond the Board's jurisdiction as far as the effect of the order of deportation." *See* Def. Mot. to Dismiss, Exh. 1, at 2.[6] Thus, the defendants have themselves indicated that an agreement obligated the government to undertake activities wholly outside the plaintiff's administrative deportation proceedings. Were the Court to interpret section 106(a) to apply to any action the government could take to allow an alien to remain in the United States, the Court would be ignoring the express language of 106(a) rendering that section applicable to deportation proceedings under 1252(b) and 1252a of Title 8. *Cf. Butterfield*, 409 F.2d at 173 (district court has jurisdiction when the alien's application for reclassification did not impugn either the finding of deportability or the order directing deportation, but instead sought an alternative solution for alien's immigration woes).

The Court notes that there are circuit court cases decided pursuant to section 106(a) that deal with challenges to deportation based on alleged breaches of cooperation agreements with the INS. *See Margalli-Olvera v. Immigration and Naturalization Serv.*, 43 F.3d 345 (8th Cir. 1994); *Thomas v. Immigration and Naturalization Serv.*, 35 F.3d 1332 (9th Cir. 1994). However, the cooperation agreements at issue in those cases obligated the government to take certain positions at administrative deportation proceedings. Thus, the agreements related only to determinations that would be made during those deportation proceedings. Here, the agreement allegedly calls for the plaintiff to concede deportability and to waive her rights of appeal in return for activity by the government outside the

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[6] In their opposition to the plaintiff's request for abeyance in the Fourth Circuit, the defendants expressly disclaimed having taken any position as to the Board's jurisdiction to consider the alleged agreement, reserving their right to state a position at a subsequent time.

deportation proceeding. Original jurisdiction over such an action lies with a district court pursuant to 28 U.S.C. § 1331. *See Butterfield*, 409 F.2d at 173.

III. SECTION 106(c) OF THE INA DOES NOT DIVEST THE COURT OF JURISDICTION OVER THE PRESENT ACTION

Finally, the defendants argue that this Court is without jurisdiction because section 106(c) of the INA precludes review of a final order of deportation by any court when the alien has departed the country after the issuance of the order. This argument misses the point. The jurisdiction of this Court has not been invoked to review the final order of deportation in the plaintiff's case, nor could this Court exercise such jurisdiction for the reasons expressed above. Thus, section 106(c) is inapplicable to the present action.

CONCLUSION

For the above reasons, the Court shall deny the defendants' Motion to Dismiss. The Court shall issue an Order of even date herewith consistent with the foregoing Memorandum Opinion and setting a schedule for the expeditious resolution of this case.

In order to protect the safety of the plaintiff and her family, and that of certain government agents involved, limited portions of the record in the above-captioned case remain under seal, specifically, the names of persons against whom the plaintiff testified when cooperating with the government and the identity of the agents with whom she cooperated. The foregoing Memorandum Opinion and the Order issued of even date herewith are not under seal and shall be made a part of the public record in the above-captioned case.

January 27*th*, 1996

/s/_____
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 95-01851 (CRR)

Marlena Ramallo,

Plaintiff,

v.

Janet Reno, *et al.*,

Defendants.

Decided January 27, 1996

Filed January 29, 1996

ORDER

For the reasons set forth in the Court's Memorandum Opinion of even date herewith, it is, by the Court, this 27th day of January, 1996,

ORDERED that the plaintiff's Motions for File Surreply shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that the defendants' Motion to Dismiss shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that any and all discovery in the above-captioned case shall be completed on or before 4:00 p.m. on March 1, 1996; and it is

FURTHER ORDERED that the parties shall meet and confer in an effort to present to the Court a Statement of Material Facts Not in Dispute on or before 4:00 p.m. on March 1, 1996; and it is

FURTHER ORDERED that the parties shall file with the Court said Statement and any Motions for Summary Judgment on or before 4:00 p.m. on March 13, 1996, and shall file any Responses thereto on or before 4:00 p.m. on March 18, 1996, and any Replies thereto on or before 4:00

p.m. on March 21, 1996, and the Court shall schedule oral arguments thereafter if deemed appropriate.

/s/_____

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 95-01851 (CRR)

MARLENA RAMALLO,

Plaintiff,

v.

JANET RENO, *et al.*,

Defendants.

Decided and Filed June 27, 1996

APPEARANCES

FOR THE PLAINTIFF: Robert S. Bennett, Richard L. Brusca, and Katharine S. Sexton, Attorneys, Skadden, Arps, Slate, Meagher & Flom, Washington, DC.

FOR THE DEFENDANTS: Philemina McNeill Jones, Assistant Director, Michelle R. Slack and Laura M. Friedman, Attorneys, Office of Immigration Litigation; along with Gary Grindler, Deputy Assistant Attorney General, George J. Phillips, Counselor to the Assistant Attorney General, and Robert L. Bombaugh, Director, Office of Immigration Litigation, all of the United States Department of Justice, Washington, DC.

MEMORANDUM OPINION OF CHARLES R. RICHEY
UNITED STATES DISTRICT COURT JUDGE

INTRODUCTION

Before the Court in the above-captioned case are the parties' Cross-Motions for Summary Judgment. Also before the Court are the defendants' Motion to Strike, Motion for Leave to File a Surreply, and Motion for Protective Order. Upon consideration of the pleadings, the entire record herein,

the law applicable thereto, and for the reasons set forth below, the Court shall deny the parties' Motions for Summary Judgment. The Court also shall declare moot the defendants' Motion to Strike, grant the defendants' Motion for Leave to File a Surreply, and grant the defendants' Motion for Protective Order.

BACKGROUND

Portions of the record herein have been filed under seal pursuant to a protective order signed by Chief Judge John Garrett Penn on September 27, 1995. The protective order was necessary to protect the identity and safety of witnesses, government representatives, and their respective family members. For the purposes of the instant Memorandum Opinion and Order, certain individuals have been referred to by title only in order to protect their anonymity and pursuant to Chief Judge Penn's protective order previously entered.

The following facts are undisputed. The plaintiff in the above-captioned case is Marlena Ramallo Kent Cooke, a native and citizen of Bolivia. She initially entered the United States in 1972 as a nonimmigrant visitor, and became a lawful permanent resident in 1978. *See In re Cooke*, No. A20 619 534 (Bd. Imm. App. Mar. 10, 1994), at 1.

On August 1, 1986, the plaintiff pled guilty to the offense of conspiracy to import less than one kilogram of cocaine in violation of 21 U.S.C. § 963 before the United States District Court for the Eastern District of Virginia, Alexandria Division. The plaintiff entered into a written plea agreement with the United States Attorney's Office on July 15, 1986, which provided that in return for her guilty plea and for her cooperation with federal law enforcement agencies and prosecutors concerning all violations of law about which she has any information, the United States agreed: that it would dismiss the remaining charges of the indictment; that no evidence she disclosed would be used against her during the course of her cooperation and that the Assistant United States Attorney ("AUSA") would bring the extent of the defendant's cooperation to the attention of the United States

Probation Officer; and that it would recommend that the Court suspend any period of incarceration and impose a period of probation at sentencing. The parties agree that the plaintiff complied with the agreement. The prosecutor recommended a suspended sentence and the plaintiff was sentenced to 18 months in prison, of which she served 5-1/2 months.

On November 21, 1986, the Immigration and Naturalization Service ("INS") issued an Order to Show Cause in the plaintiff's case, charging her with deportability under section 241(a)(11) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(11),[1] as a result of her criminal conviction. *Id.* The initial deportation hearing took place on February 25, 1987. Following two continuances, the plaintiff began to present evidence on April 6, 1988. The INS hearing was adjourned on April 6, 1988 and reconvened on May 10, 1988.

At the May 10, 1988 hearing, the following individuals discussed an agreement during a recess: an INS trial attorney, a Drug Enforcement Agent ("DEA agent"), the plaintiff's then-attorney, and the plaintiff. That agreement ("the cooperation agreement") is the core of the present dispute. The undisputed terms of the cooperation agreement were that: (1) the plaintiff agreed that she would cooperate with the DEA and the United States Attorney's Office in the investigation and prosecution of drug traffickers; (2) the plaintiff agreed to concede her deportability; (3) the plaintiff agreed to withdraw her application for a waiver of deportation pursuant to section 212(c) of the Act; and (4) the plaintiff

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[1] Section 241(a)(11) is now section 241(a)(2)(B) of the INA, 8 U.S.C. § 1251(a)(2)(B), and reads:

> Any alien who at any time after entry has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable.

agreed to waive her appeal of the Immigration Judge's decision finding her deportable. In exchange, the plaintiff alleges that the government, among other things, promised not to deport her.

On May 10, 1988, the INS attorney stated on the record during the plaintiff's administrative hearing that the plaintiff:

> is going to withdraw the requested relief under 212(c) and is prepared to waive appeal on this case. The Service has agreed that Ms. Ramallo is not going to be taken into custody, that the carryover of the $3,000 bond is sufficient, and that there is an agreement of all parties that there will be an additional request made to the District Director which is beyond the Court's jurisdiction as far as the effect of the order of deportation.

On May 10, 1988, Immigration Judge Arrowsmith entered an order of deportation against the plaintiff. No appeal was taken from that order. *Id.*

The parties agree that the plaintiff complied with the following terms of the agreement: (1) she fully cooperated with the United States Attorney's Office and the DEA; (2) she withdrew her request for a waiver of deportation under section 212(c) of the Act; (3) she conceded her deportability; and (4) she waived her right to appeal the Immigration Judge's decision finding her deportable.

Subsequent to the May 10, 1988 hearing, Immigration Judge Arrowsmith contacted the INS attorney after seeing the plaintiff on television attending a Redskins' game and asked why the plaintiff had not been deported.

On May 15, 1990, there was a meeting among government representatives and the plaintiff's then-counsel to discuss avenues of administrative or legislative relief for the plaintiff in light of the outstanding order of deportation issued against her on May 10, 1988. One of the options discussed was a motion to reopen the deportation proceedings to give the plaintiff the opportunity to apply for a section 212(c) waiver of deportation. At that meeting, it was determined that the United States Attorney would file the motion to reopen.

However, on February 10, 1992, the INS filed the motion to reopen on the plaintiff's behalf.

On February 20, 1992, Immigration Judge Arrowsmith granted the motion to reopen the plaintiff's deportation proceedings and, on March 17, 1992, gave the plaintiff's attorney one week to file the application for a waiver of deportation (Form I-191) under section 212(c) of the Act. The Form was not submitted; however, and on April 15, 1992, Immigration Judge Arrowsmith denied the plaintiff's request for relief under section 212(c). On May 1, 1992, the plaintiff filed a Notice of Appeal with the Board of Immigration Appeals of the order denying her relief.

On July 9, 1992, the INS moved to dismiss the plaintiff's appeal to the Board of Immigration Appeals based on the plaintiff's departures from the United States after the issuance of the order of deportation on May 10, 1988. Records reflect that the plaintiff departed and reentered the United States on numerous occasions between 1988 and 1992. On August 4, 1992, the INS notified the plaintiff through her attorney that if she left the United States and attempted to reenter during the pendency of immigration proceedings against her, she would be placed in exclusion proceedings.

On March 10, 1994, the Board of Immigration Appeals dismissed the plaintiff's case for want of jurisdiction, holding that her departures from the United States subsequent to her order of deportation divested the Board of jurisdiction to consider her motion to reopen. On April 8, 1994, the plaintiff filed a petition for review of the Board's decision with the United States Court of Appeals for the Fourth Circuit. *See Cooke v. Immigration and Naturalization Serv.*, No. 94-1456 (4th Cir. filed Apr. 8, 1994).

On September 28, 1995, the plaintiff filed the instant action in this Court, alleging violations of the plaintiff's Fifth Amendment rights, breach of contract, and promissory and equitable estoppel. The plaintiff seeks, *inter alia*, an order declaring that the May 1988 agreement is a legal and binding obligation of the government, and specific enforcement of the

agreement by permanently enjoining the government from taking any further action to deport the plaintiff or refuse her reentry into the United States to the extent the plaintiff travels abroad, and by requiring the government to take any and all actions necessary to restore the plaintiff's status as a permanent resident of the United States.

After filing the instant action, the plaintiff filed a motion to hold the Fourth Circuit proceedings in abeyance pending the outcome of the present case. In a single-judge order, the Fourth Circuit opined:

> It appearing to me that at one time, at least, in the recent past the government had an agreement with Marlena Kent Cooke that she could apply for a waiver to deportation, or like provision for her to live in the United States, if she were helpful to the government in the prosecution of certain criminal cases. And it further appearing that she may well have, and probably has, lived up to her part of the agreement, but that the government now opposes a decision on the merits of her application for a waiver of deportation or provision to live in the United States, for some reason which is not clear to me. The said Marlena Kent Cooke has sued the government in the District of Columbia, seeking to enforce the said agreement, in *Ramallo v. Reno, et al.* No. 1:95CV01851, and on that account seeks to have the proceedings in this case held in abeyance.
>
> I am of [the] opinion Marlena Kent Cook [sic] should be permitted to pursue her said case in the district court in the District of Columbia.

Cooke v. Immigration and Naturalization Serv., No. 94-1456 (4th Cir. Nov. 7, 1995) (Order) (Widener, Jr., J.).

In the present suit, the-defendants moved for dismissal on the basis that this Court lacks subject matter jurisdiction over the plaintiff's Complaint. The defendants argued that the plaintiff's action "seeks to review the validity of a matter on which her final order of deportation is contingent and requests relief inconsistent with a final order of deportation, which is

within the exclusive jurisdiction of the court of appeals" under section 106(a) of the INA. Furthermore, the defendants argued that the plaintiff's departure from the United States while under a final order of deportation "self-executed" the order of deportation and thereby removed this Court's jurisdiction over the order pursuant to section 106(c) of the INA. In a Memorandum Opinion and Order filed on January 29, 1996, this Court held that it had jurisdiction over the claims alleged and the relief sought under 28 U.S.C. § 1331, notwithstanding the immigration context in which the claims arose. *Ramallo v. Reno*, 918 F. Supp. 11 (D.D.C. 1996) (Richey, J.).

The parties have concluded their latest round of briefing. The plaintiff has moved for summary judgment on her claims that the government breached the agreement in violation of her Constitutional rights and that the government is promissorily and equitably estopped from deporting her. The defendants move for summary judgment as well. The defendants do not contest that a cooperation agreement was reached, but assert that it only promised the plaintiff a temporary stay of deportation. Further, the defendants assert that, regardless of the terms of the agreement, the representatives that dealt with the plaintiff did not have authority to bind the government. Alternatively, the defendants argue that the plaintiff modified the original agreement and that the plaintiff's own actions demonstrate that she has unclean hands and that she is therefore precluded from obtaining equitable relief.

DISCUSSION

I. THE AFFIDAVIT OF THE INS ATTORNEY IN THIS CASE RAISES A GENUINE ISSUE OF MATERIAL FACT REGARDING WHETHER THE GOVERNMENT PROMISED NOT TO DEPORT THE PLAINTIFF IN EXCHANGE FOR HER COOPERATION; THEREFORE, THE COURT SHALL DENY THE PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND SHALL ORDER AN EVIDENTIARY HEARING PURSUANT TO FED. R. CIV. P. 43(e).

A. Summary Judgment Is Appropriate When There Is No Genuine Issue Of Material Fact And The Moving Party Is Entitled To Judgment As A Matter Of Law.

Summary judgment is mandated under Federal Rule of Civil Procedure 56(c) when the record "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (citation omitted).

An issue must be both genuine and material to preclude the entry of summary judgment. *Anderson*, 477 U.S. at 247-48. An issue is genuine if there is sufficient evidence to support a rational finding either way. In making this determination, the non-movant's evidence "is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Id.* at 255. "Only disputes of facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment." *Id.* at 248.

Because the Court would be the ultimate trier of fact in this case if it went to trial, "[c]onflict concerning the ultimate and decisive conclusion to be drawn from undisputed facts does not prevent rendition of a summary judgment." *Fox v. Johnson & Wimsatt. Inc.*, 127 F.2d 729, 737 (D.C. Cir. 1942); *see also Connors v. Incoal, Inc.*, 995 F.2d 245, 251 (D.C. Cir. 1993) (summary judgment appropriate in non-jury setting when "factual" issue is one of characterization of lay facts). The Court may draw derivative inferences from undisputed subsidiary facts so long as those inferences do not depend on the evaluation of witness credibility. *Cook v. Babbitt*, 819 F. Supp. 1, 11 n.11 (D.D.C. 1993) (Lamberth, J.).

B. The Crux Of The Present Dispute Is Whether The Government Promised The Plaintiff She Would Not Be Deported In Exchange For Her Cooperation.

The plaintiff states that under the cooperation agreement, she agreed to consent to the entry of an order of deportation and waive any appeal of that order; to voluntarily withdraw her request for a waiver of deportation; and to continue and expand her cooperation with DEA and the U.S. Attorney's Office by testifying in open court at trial and/or additional grand jury testimony and by acting as an undercover informant against various members of South American drug cartels. There is no dispute that the plaintiff has fulfilled these terms of the agreement. The plaintiff states that, in return, the government agreed to take no action to enforce the final order of deportation against her; not revoke or otherwise invalidate her green card; permit her to travel outside of, and return to, the United States in order to both collect information for DEA and for personal holidays or vacations; and have the deportation order withdrawn at a future date and to restore her status as a lawful permanent resident of the United States. Plaint's Mot. for Summ. Jud. at 7-8. While the defendants do not dispute that a cooperation agreement was made, they take issue with each of their obligations under the agreement, as detailed by the plaintiff. Most importantly, the defendants assert that the plaintiff was promised only a

temporary stay of deportation in exchange for her cooperation and that she could not travel freely outside the United States.

The cooperation agreement at issue here was not reduced to writing; it was the result of discussions involving the plaintiff, her attorney, the INS attorney, the DEA Agent, and an AUSA. The crux of the bargain here was the government's alleged promise not to deport the plaintiff in exchange for her cooperation. The details of the plaintiff's green card, travel permission, and alien status are merely terms by which that agreement would be implemented. Regardless of these details, the Court shall conclude herein that the great weight of the evidence supports the plaintiff's assertion that the government promised not to deport her; however, the INS attorney's affidavit precludes summary judgment on this issue. Therefore, the Court shall hold an evidentiary hearing pursuant to Rule 43(e) of the Federal Rules of Civil Procedure in order to determine the limited issue whether the government promised not to deport Ramallo. If, after the hearing, the Court determines that the government in fact promised not to deport Ramallo, the Court shall enforce that promise.

C. **The Plaintiff's Contention That She Would Not Be Deported Is Supported By All The Evidence Except The Affidavit Of the INS Attorney.**

1. **The plaintiff's contention that she was promised she would not be deported is the most logical one under the circumstances and is supported by testimony from both the plaintiff's and the government's witnesses.**

At the outset, the Court cannot help but question the government's contention that the plaintiff volunteered to cooperate by testifying against vicious South American drug dealers in exchange for only a brief stay of deportation that would last until she finished testifying for the government. The consequence of such an agreement, of course, would be that the plaintiff ultimately would be deported into the waiting arms of the friends of those against whom she had just

testified. Given the choice between that and being immediately deported without having first made dangerous enemies for herself, the Court can only infer that Ramallo would choose the latter course. Ramallo herself testified at her deposition in this case:

> Q: [I]f the deal had been that you could testify for them and remain in the country during the time you were testifying but then after that you had to go back, would that have been the deal you would have accepted?
>
> A: No, of course not. I'd be dead.
>
> Q: Well, what do you mean?
>
> A: Testify against all that people, you go back, they have you killed. I would rather not testify and just go home immediately.

Pl's Mot. for Summ. Jud. Exh. A.

Ramallo's then-attorney testified that he took "shorthand" notes at the May 1988 meeting, from which he immediately prepared a summary. The summary, submitted to the Court, details the terms of the cooperation agreement:

> [The INS attorney] would drop charges (to deport) if Marlen would agree with all of [the DEA agent's] demands. (INS District Director would sit on Deportation Order) (*keep in drawer*). When INS was informed by DEA that Marlen cooperated as per *our Agreement*, Marlen's Deportation Order would be vacated or quashed.

Handwritten Notes, dated May 10, 1988, Pl's Mot. for Summ. Jud. Exh. G. When asked at a deposition about the agreement, Ramallo's then-attorney testified as follows:

> Q: If someone were to make the claim . . . that the only agreement reached on May 10, 1988, was that Ms. Ramallo could remain in the country for so long as she provided testimony to the government and would thereafter be subject to deportation, what would you respond?

A: I would have laughed in their face.

Pl's Mot. for Summ. Jud. Exh. C at 119.

The government participants to the agreement not only understood the extreme danger Ramallo would place herself in if she entered into a cooperation agreement, but also corroborate the plaintiff's version of the agreement. The DEA agent who worked with the plaintiff provided the following testimony regarding the danger involved and regarding the terms of the cooperation agreement:

> Q: Now, was it your understanding that Ms. Ramallo would be able to remain here permanently in the United States in exchange for her cooperation, or was it your understanding that she could only stay here while she cooperated, and once her cooperation was through she could be deported:
>
> * * * *
>
> A: My understanding was that she was going to be permitted to stay in the United States. I don't believe an issue ever came up about it was only while she cooperated. It was my understanding that she was going to be permitted to stay here.
>
> Q: And how do you have that understanding?
>
> A: Based on what she was doing. Based on conversations that I had had with [the AUSA and the INS attorney] and Marlena herself, unless I grossly misunderstood what everyone was saying. She would not have testified against the people that she was testifying against if she knew that she was going to go back to Bolivia. I mean, that's why I developed this understanding.
>
> Q: Why do you say that, that she wouldn't have testified against these people?
>
> A: Because that would have been illogical.

Pl's Mot. for Summ. Jud. Exh. B at 56-57. And, as the AUSA stated in an affidavit, "Ms. Ramallo was well aware of the

risks inherent with her cooperation, and in my estimation it would have been illogical for her to cooperate against prominent members of South American drug gangs if she believed she would be deported back to that area of the world after her cooperation was completed." Pl's Mot. for Summ. Jud. Exh. D.

Thus, Ramallo's version of the agreement, which is the most logical, is also corroborated by those closely involved with the alleged agreement--Ramallo herself, her then-attorney, the AUSA, and the DEA agent.

2. The government's subsequent conduct supports the plaintiff's contention that she was promised she would not be deported.

Subsequent to the plaintiff's cooperation with the government, the government took, or failed to take, various actions that also support the plaintiff's assertion that the government had agreed not to deport her. First, the government took no steps to deport the plaintiff until August 1992, despite the fact that a Deportation Order issued in 1988. Also, on December 18, 1989, the Assistant District Director for Detention and Deportation in the INS Arlington District Office called the DEA agent and confirmed that the "DEA-AUSA made deals with [Ramallo]," and that because of her cooperation with those agencies, she has "no chance of survival in Bolivia." Handwritten Notes dated Dec. 18, 1989, Pl's Mot. for Summ. Jud. Exh. P.

Moreover, on May 15, 1990, the INS District Director held a meeting in his office with the AUSA, the INS attorney, another INS official, and the plaintiff's counsel. A description of what occurred at that meeting has been provided to the Court by way of a memorandum from the District Director to the Commissioner, ERO. Pl. Mot. for Summ. Jud. Exh Q. The memorandum describes that the purpose of the May 15, 1990 meeting was "to discuss avenues of administrative relief for Ms. Ramallo with regards to her outstanding Order of Deportation issued on May 10, 1988." Plaint's Mot. for Summ. Jud. Exh. Q. The memorandum also

states that "[Ms. Ramallo] has . . . been permitted to remain in the United States due to an agreement made on May 10, 1988 with the former District Director, [the INS attorney, and the AUSA]." *Id.* During the meeting, several options were discussed for allowing Ramallo remain permanently in the United States, including a private bill, deferred action, stay of deportation, and a motion to reopen. It was decided that the "most feasible and equitable avenue to proceed would be the motion to reopen." *Id.* The motion to reopen was to be initiated by the U.S. Attorney as the representative for Ramallo. *Id.*

The following statement was made in the government's motion to reopen:

> An agreement was apparently reached in this case between the trial attorney for the Service and the respondent, through her counsel. The agreement apparently required the respondent to withdraw her 212(c) application and accept an order of deportation. The respondent was then to help other federal agencies with drug prosecutions *in lieu of actually being physically deported from the United States.*
>
> In the time that has passed since the original order of deportation was entered, the respondent has been extremely helpful to the government of the United States and has provided critical information that has resulted in the successful prosecution of many drug-related cases in the Eastern District of Virginia. . . . *This motion is based on the fact that the respondent has been a lawful permanent resident of the United States since April 4, 1978, that she has never had a 212(c) waiver hearing and she has continued to be of valuable service to the United States Government.*

Mot. to Reopen Deportation Proceedings, Pl's Mot. for Summ. Jud. Exh. T (emphasis added). Notably, the underlined text plainly means that, under the terms of the cooperation agreement, Ramallo was to provide assistance to the government instead of being deported and that the

government considered her alien status to be that of a lawful permanent resident since 1978.

The government argues that the May 15, 1990 meeting evidences, if anything, a *modification* of the original contract wherein the government agreed only to file a motion to reopen. That position, however, is inconsistent with the memorandum by the INS District Director, which clearly indicates that the purpose of the meeting was to devise a plan to effectuate the government's promise that Ramallo not be deported. Similarly, with regard to the May 15, 1990 meeting, the AUSA in this case stated:

> [T]he purpose of this meeting would be to attempt to select and agree on a plan which would permit Ms. Ramallo to stay in the United States permanently, in return for her already provided extensive assistance to the United States government in identifying and convicting several major drug criminals. . . . As I recall, everyone at the May 15th meeting, myself included, believed that the government should protect Ms. Ramallo by finding a way to allow her to stay in the United States on a permanent basis. If no such collective belief existed, it seems clear to me that the May 15, 1990 meeting would not have been handled the way it was, with all parties exchanging their views on how best to proceed with a plan to provide Ms. Ramallo with permanent residence in the United States. In addition, I do not recall anyone at the May 15, 1990 meeting voicing a contrary opinion.

Pl's Mot. for. Summ. Jud. Exh. D. Thus, contrary to the government contentions now, it would appear that the May 15, 1990 meeting was not a modification of the original agreement terms but, rather, a meeting to discuss a method by which the government would attempt to fulfill its part of the bargain.

3. The affidavit of the INS attorney creates a genuine issue of material fact precluding summary judgment.

Although the great weight of the evidence supports Ramallo's contention that the government promised not to deport her, the defendants have submitted the affidavit of the INS attorney in opposition to the plaintiff's Motion for Summary Judgment. *See* Defs' Opp. Exh. 5. In that affidavit, the INS attorney avers, among other things, that the plaintiff was promised only that the DEA and the U.S. Attorney's Office would request a temporary stay of deportation from the INS District Director in return for her cooperation. This testimony raises a genuine issue of material fact as to whether the plaintiff was promised that she would not be deported in exchange for her cooperation and crucial testimony in several cases in the United States District Court for the Eastern District of Virginia.

4. The Court shall hold an evidentiary hearing pursuant to Rule 43 (e) to resolve the issue whether the plaintiff was promised that she would not be deported.

Because of the INS attorney's affidavit, the Court shall hold an evidentiary hearing pursuant to Rule 43(e) of the Federal Rules of Civil Procedure to resolve the issue whether the plaintiff was promised that she would not be deported. The Court shall issue an order of even date herewith setting forth a schedule for the prompt resolution of that issue.

D. <u>The Government Would Be Bound by The Alleged Promise Not To Deport The Plaintiff.</u>

The defendants assert that, even assuming the terms of the agreement are exactly as the plaintiff claims they are, that is, that the plaintiff was promised she would not be deported, the government would not be bound by such an agreement. The Court disagrees.

The Court begins its analysis with a well-settled proposition that is founded in the fundamental fairness

doctrine of the Fifth Amendment: when the government makes a promise that induces someone to relinquish constitutional or other substantial rights, that promise must be fulfilled. *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971) ("[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."); *United States v. Cooper*, 70 F.3d 563, 567 (10th Cir. 1995) ("When [plea] agreements are made with full knowledge of the facts at hand, those agreements should be . . . 'fulfilled to maintain the integrity of the plea,' not to mention the integrity of the government."); *United States v. Martin*, 25 F.3d 211 (4th Cir. 1994) (defendant entitled to specific performance when government breached oral modification to plea agreement); *Plaster v. United States*, 720 F.2d 340, 350, 354 (4th Cir. 1983) (fundamental fairness of Fifth Amendment required enforcement of government's promise of immunity even when written agreement lost in mail and defendant was never call upon to perform his part of the bargain); *United States v. Cooper*, 594 F.2d 12 (4th Cir. 1979) ("[A] constitutional right to enforcement of plea proposals may arise before any technical 'contract' has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals."); *Petition of Geisser*, 554 F.2d 698 (5th Cir. 1977) (specific performance ordered despite valid international treaty requiring the United States to extradite petitioner that conflicted with promise in plea bargain to use best efforts to prevent extradition); *United States v. Castelbuono*, 643 F. Supp. 965, 971 (E.D.N.Y. 1986) (oral agreement could have been fully enforced had defendant sought to do so); *Tully v. Scheu*, 487 F. Supp. 404, 411-12 (D.N.J. 1980) (when defendant irretrievably changes position in reliance on agreement, U.S. Constitution mandates specific performance of government's agreement; retraction of plea meaningless when defendant's cooperation with government made him a target for vengeance of former criminal associates), *rev'd on other grounds*, 637 F.2d 917 (3d Cir.

1980). At stake in such circumstances are the liberty of the defendant, the honor of the government, public confidence in the fair administration of justice, and the efficient administration of justice. *Cooper*, 594 F.2d at 20 (quoting *United States v. Carter*, 454 F.2d at 426, 428 (4th Cir. 1972)).

The government argues that the doctrine embodied in the aforementioned cases does not apply to the cooperation agreement at issue because the agreement is not a plea agreement and, therefore, does not involve "the constitutional right to a jury trial or to challenge defects in a criminal proceeding." Def.'s Mot. for Summ. Jud. at 8. Nevertheless, what the plaintiff surrendered here by cooperating with the government was just as important as the right, for example, to a jury trial in a criminal case. Ramallo severely compromised her own safety by cooperating with the government. The AUSA involved testified as to the extent and value of the plaintiff's cooperation and stated that she would be in danger if she were deported to Bolivia. Plaint's Mot. for Summ. Jud., Exhs. B, H. Furthermore, the DEA agent testified that after Ramallo cooperated in 1988, 1989, and 1990, she was in even greater danger. *Id.* Lest it be overlooked, the failure to honor the agreement alleged here not only could result in a loss of liberty, but also very well could result in death.

Furthermore, the plaintiff undisputedly relinquished her right to a full hearing before the Immigration Judge as a result of the cooperation agreement. *Cf. McLeod v. Peterson*, 283 F.2d 180, 183-84 (3d Cir. 1960) ("In [a case involving] the status of an alien, we are dealing with an especially critical and fundamental individual right. . . . Meticulous care must be exercised lest the procedure by which [an alien is deported] not meet the essential standards of fairness."); *Tejeda v. United States*, 346 F.2d 389, 392-95 (9th Cir. 1965) (same) (concurring opinion); *Sun Il Yoo v. INS*, 534 F.2d 1325, 1329 (9th Cir. 1976) (Deportation is drastic measure that may result in the "loss of all that makes life worth living."); *See also United States v. Board of Educ.*, 567 F. Supp. 272, 283 (N.D. Ill.) (specific performance of settlement agreement awarded

when party had waived right to litigate civil action in reliance on U.S. government agreement).

This Court concludes that the due process concerns involved with a plea agreement are just as prevalent with respect to the agreement at issue here and rejects outright the defendants' argument to the contrary. The notion of fundamental fairness at issue with respect to a plea agreement deserves no less respect when the agreement at issue is a cooperation agreement. *Accord Thomas v. INS*, 35 F.3d 1332 (9th Cir. 1994) (cooperation agreements like plea agreements are enforceable).

The defendants also argue that the INS Trial attorney, the AUSA, and the DEA agent, who allegedly promised the plaintiff that she could remain in the country, nevertheless had no authority to bind the government. Again, the Court disagrees.

In *Thomas v. INS*, 35 F.3d 1332 (9th Cir. 1993), the Ninth Circuit addressed the question whether a United States Attorney's promise to an alien in a cooperation agreement bound the INS. Answering that question in the affirmative, the Court noted, first, that the promise would be binding only if the United States Attorney had either an express grant of authority to make such a promise, or his authority for making the promise was incidental to some other express grant of authority. *See Thomas*, 35 F.3d at 1338. Finding neither an express grant nor an express limitation of authority to bind the INS, the Court proceeded to hold that the United States Attorney's power to "prosecute for all offenses against the United States," 28 U.S.C. § 547(1), implies such authority under ordinary principles of agency law. *Id.* at 1339. Similarly, the Eighth Circuit has adopted the reasoning of *Thomas*, and upheld the authority of the United States Attorney to bind the INS to a plea agreement. *Margalli-Olvera v. INS*, 43 F.3d 345 (8th Cir. 1994). *See also Harvey v. INS*, 8 F.3d 426 (7th Cir. 1993) (a United States Attorney for one district could bind a United States Attorney in another district). The Eleventh Circuit, on the other hand, has held that a United States Attorney, being neither an INS officer nor

employee, did not have the authority to promise that an alien would not be deported. *San Pedro v. United States*, 79 F.3d 1065 (11th Cir. 1996).

While the Court is persuaded by the reasoning of the *Thomas* and *Margalli-Olvera* courts and not by that of the *San Pedro* court, it need not now definitively choose between this division of authority because the issue of the government agent's authority to bind the INS here is much simpler. In this case, the promise not to deport allegedly was made, not only by an AUSA, but by an INS attorney, whose job is to represent the INS, *inter alia*, in matters of deportation proceedings. Absent an express limitation to such authority, it is clear under principles of agency law that an attorney for the INS, engaged in representing the INS in deportation proceedings against the plaintiff, had the authority to bind the INS in this cooperation agreement. *Cf. United States v. Cooper*, 594 F.2d 12, 20 (4th Cir. 1979) ("Once plea discussions are underway, it clearly lies with the agencies of government to keep the left hand informed of the right's doing [and] to withhold or limit the actual, and circumscribe the apparent, authority of subordinates if this be considered necessary.").

The defendants next argue that the promise not to deport the plaintiff would not be enforceable because there allegedly is no provision of law under which the defendants could effectuate such a promise. In response, the plaintiff has described several means by which the defendants could have complied with their agreement not to deport the plaintiff. For example, the plaintiff points out that the Attorney General may, in her discretion, reverse a Board of Immigration Appeals' decision. *See* 8 C.F.R. § 3.1(h). In addition, under the Witness Protection Program, 18 U.S.C §§ 3521, the Attorney General may take whatever measures are necessary to protect the life of a grand jury witness. Also, the government could have granted a suspension of deportation. 8 U.S.C. § 1254(a)(2).

The government has responded by asserting, essentially, that none of these avenues of relief are now available to the

plaintiff because Ramallo withdrew her section 212(c) request and waived her rights to appeal. This point misses the mark, however. The plaintiff intends not to propose methods by which the government may now comply with its agreement, but to explain that at the time the government entered into the agreement, there were provisions of law enabling the government to effectuate its promise. The government does not, and cannot, dispute that. This Court is not persuaded by the government's claim that it cannot live up to its promise now because the plaintiff took steps the government directed her to take in order to effectuate its promise.

E. **The Government Would Not Be Relieved Of Its Promise To The Plaintiff Simply Because The Plaintiff May Have Traveled Outside The Country Without First Obtaining Authorization From the DEA agent.**

There is some conflicting evidence in the record concerning the specific conditions under which the plaintiff would be permitted to travel outside the country. The plaintiff alleges that, pursuant to the agreement, she would be permitted to travel outside of, and return to, the United States in order to collect information for the DEA and for personal holidays or vacations, as long as she obtained permission to do so from the DEA agent. The government claims that the plaintiff is barred from recovery because she left the country on several occasions without receiving authorization from the DEA agent. The Court concludes that, even if Ramallo took several trips without first obtaining authorization, that would not preclude her from obtaining relief on summary judgment because she substantially complied with the cooperation agreement and because the government would be estopped from deporting her.

1. The government could not avoid its contractual obligations because the plaintiff substantially complied with the cooperation agreement and any deviation was minor and of no legal effect.

Generally, a party to a bilateral contract may demand substantial compliance with the terms of the contract. *Clayman v. Goodman Props., Inc.*, 518 F.2d 1026, 1034-35 (D.C. Cir. 1973). "In most cases . . . a promisor's tender in good faith of a performance fully in compliance with the contract save for minor and unimportant deviations avoids a breach enabling the promisee to escape his obligations thereunder." *Id.* at 1035; *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007 (D.C. Cir. 1985) (substantial performance exists when a contracting party has failed to render full performance but the defects are, all considered, minor; the substantial performance doctrine may apply to any contract).

The government cannot escape its obligation to Ramallo under the cooperation agreement because Ramallo substantially complied with its terms. It is undisputed that Ramallo provided valuable information to the government and was responsible for securing the convictions of numerous drug dealers. Thus, the government received and enjoyed all the benefits of Ramallo's cooperation. The terms by which she could travel out of the country on occasion, whatever they were, were a minor part of the cooperation agreement.

2. The government is estopped from deporting the plaintiff.

In addition to the foregoing, the Court agrees with the plaintiff that estoppel would apply against the government here. *See National Juvenile Law Center. Inc. v. Regnery*, 564 F. Supp. 1320, 1327-28 (D.D.C. 1984) (promissory estoppel applies against the government when the plaintiff reasonably relies on promise, estoppel is necessary to overcome an injustice, and will not cause undue damage to the public interest), *rev'd*, 738 F.2d 455 (D.C. Cir. 1984) (facts of case

did not meet standard set forth by trial court with respect to reasonable reliance); *Morris v. Runyon*, 870 F. Supp. 362 (D.D.C. 1994). *See also Moser v. United States*, 341 U.S. 41 (1951) (when government led immigrant to believe false assertion that his application for U.S. citizenship would not be adversely affected by seeking an exemption from military service, immigrant exempted from that requirement); *United States v. Chargualaf*, 76 F.3d 389 (9th Cir. 1996) (detrimental reliance on oral plea agreement could estop government from withdrawing agreement) (table); *United States v. Savage*, 978 F.2d 1136, 1138 (9th Cir. 1992), *cert. denied*, 507 U.S. 997 (1993) (detrimental reliance on government's promise of terms in plea bargaining could lead to specific enforcement); *Sun Il Yoo v. INS*, 534 F.2d 1325 (9th Cir. 1976) (conduct of INS estopped government from denying petitioner benefit of precertification); *United States v. Ruby Co.*, 588 F.2d 697 (9th Cir. 1978) (equitable estoppel lies against government when it has committed affirmative misconduct), *cert. denied*, 442 U.S. 917 (1979); *Santiago v. INS*, 526 F.2d 488 (9th Cir. 1975) (same), *cert. denied*, 425 U.S. 971 (1976).

Here, Ramallo's reliance on the government's promise was reasonable, given that both she and the government understood the danger to her life involved with her cooperation with prosecutors and openly testifying against members of South American drug gangs. Estoppel is necessary to overcome the grave injustice that would befall Ramallo if she is deported. Finally, the public interest is furthered in ensuring that constitutional rights are upheld, that the government does not induce individuals to forfeit substantial rights in exchange for meaningless promises, and that persons in the American system of justice are encouraged to cooperate with the government.

As for the government's assertion that it has not engaged in affirmative misconduct, if the Court finds that Ramallo was promised that she would not be deported, the government's subsequent moves to deport her, especially given the nature and extent of her cooperation, would constitute such misconduct. *Cf. Sun Il Yoo*, 534 F.2d at 1328 (INS's

unexplained delay in considering application constituted affirmative misconduct). And, as for the government's assertion of an unclean hands defense based on Ramallo's travel outside the country, there is not a sufficient basis in the record to conclude that Ramallo acted in bad faith when she did so. *See Rubin v. Estate of Warner*, 881 F. Supp. 23, 26 (D.D.C. 1995) ("unclean hands" defense requires that plaintiff acted in bad faith). The DEA agent testified that "[Ramallo] told me that she would travel, and I didn't object to it." Pl's Mot. for Summ. Jud. Exh. B. The plaintiff herself testified she believed she had a right to do so. The Court has considered all the evidence adduced by the parties relating to Ramallo's trips. On the undisputed facts, the Court may, and does, infer that Ramallo did not act in bad faith. *See Connors v. Incoal, Inc.*, 995 F.2d 245, 251 (D.C. Cir. 1993) (when the only factual issue is one of characterization of undisputed lay facts and the opponent of summary judgment claims no right to jury trial, the dispute is properly resolved on summary judgment).

II. THE COURT SHALL DECLARE MOOT THE DEFENDANT'S MOTION TO STRIKE.

The defendant moves to strike the plaintiff's "Statement of Material Facts as to which the Plaintiff Contends there is no Genuine Issue." The defendants complain that the pleading contravenes the Court's Order that the parties meet and confer and file a joint statement of uncontested material facts, which they did, and that the pleading does not comply with Local Rule 108 (h). The Court relied only on the parties' joint submission in determining the issues decided herein. The instant Memorandum Opinion and Order render moot the defendants' instant motion to strike.

III. THE COURT SHALL GRANT THE DEFENDANT'S MOTION FOR LEAVE TO FILE A SURREPLY.

The defendants have moved for leave to file a surreply. The plaintiff opposes.

The Court shall grant the defendant's motion for leave to file a surreply because the surreply responds to the plaintiff's request in her reply brief to strike six of the affidavits filed in

opposition to her motion for summary judgment. Included in those affidavits is that of the INS attorney, which was filed late. The plaintiff's request with respect to the INS attorney's affidavit is denied because this affidavit was delayed due to a family medical emergency. As for the other affidavits, the Court need not address technical deficiencies in light of its ruling and denies the plaintiff's request.

IV. THE COURT SHALL GRANT THE DEFENDANT'S MOTION FOR A PROTECTIVE ORDER.

The defendants have requested a protective order concerning any information relating to the INS attorney received by the plaintiff, provided by the government to the plaintiff, or provided in proceedings before this Court. The defendants urge that such an order is necessary for the safety of the INS attorney and that attorney's family members. Plaintiff's counsel has concurred in the motion. Accordingly, the Court shall grant the defendant's motion.

CONCLUSION

For the above reasons, the Court shall deny the parties' Cross-Motions for Summary Judgment. The only evidence that contravenes the plaintiff's contention as to the government's agreement not to deport her consists of an affidavit by the INS attorney involved in these proceedings. However, this affidavit is directly contravened not only by the plaintiff, but by the INS District Director, the AUSA, the DEA agent, and the United States District Court for the Eastern District of Virginia.

In addition, common sense supports the conclusion that the plaintiff, an adult of some sophistication, would not endanger her very life by cooperating with the government in a multitude of cases involving her native Latin American country and perhaps others when it is axiomatic that Latin America is the home of deadly drug distributing cartels. Under these circumstances, for the plaintiff to have undertaken to cooperate and assist in the conviction of members of these cartels and

then agreed to go back to her native country is too preposterous to even contemplate.

Notwithstanding the foregoing, and what appears throughout this Memorandum Opinion, the Court has determined to hold a limited hearing so that it can make a judgment as to the credibility of the INS attorney and so that it can determine whether that witness can successfully controvert the conclusions of the Court based on the record herein. This hearing will take place pursuant to Federal Rule of Civil Procedure 43(e). Again, the Court believes that an agreement that is entitled to respect under the Due Process Clause of the Constitution has been established in this record. Nevertheless, it will offer the government an opportunity to tender this one witness to determine whether, as a matter of fact, the witness can overcome the conclusions herein reached. The Court shall issue an Order of even date herewith consistent with the foregoing Memorandum Opinion.

In order to protect the safety of the plaintiff and her family, and that of certain government agents involved, portions of the record in the above-captioned case have been placed under seal, specifically, the names of persons against whom the plaintiff testified when cooperating with the government and the identity of the agents with whom she cooperated. The foregoing Memorandum Opinion and the Order issued of even date herewith contain have complied with these concerns to the extent possible. However, this lawsuit is a matter of public concern, and the public is at least entitled to know the basis of the Court's reasoning. Therefore, the Court's Memorandum Opinion and Order shall be made a matter of public record.

June 27*th*, 1996

*/s/*_____

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 95-01851 (CRR)

MARLENA RAMALLO,

Plaintiff,

v.

JANET RENO, *et al.*,

Defendants.

Filed and Decided June 27, 1996

ORDER

For the reasons set forth in the Court's Memorandum Opinion of even date herewith, it is, by the Court, this 27th day of June, 1996,

ORDERED that the parties' Motions for Summary Judgment shall be, and hereby are, DENIED; and it is

FURTHER ORDERED that the defendants' Motion to Strike shall be, and hereby is, declared MOOT; and it is

FURTHER ORDERED that the defendants' Motion for Leave to File a Surreply shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that the defendants' Motion for Protective Order concerning any information relating to the INS attorney received by the plaintiff, provided by the government to the plaintiff, or provided in proceedings before this Court shall be, and hereby is, GRANTED; and it is

FURTHER ORDERED that, the Court shall hold an evidentiary hearing pursuant to Rule 43(e) of the Federal Rules of Civil Procedure at such time and date to be determined by the Court.

June 27*th*, 1996 /s/_____

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 95-01851 (CRR)

MARLENA RAMALLO,

Plaintiff,

v.

JANET RENO, *et al.*,

Defendants.

Decided and Filed July 3, 1996

ORDER

On July 3, 1996, the Court held a hearing pursuant to Rule 43(e) of the Federal Rules of Civil Procedure in the above-captioned case. Present at that hearing were the plaintiff and her counsel, the plaintiff's husband, and five attorneys on behalf of the government. At that hearing, the Court heard the testimony of the INS attorney referred to in the Court's Memorandum Opinion and Order filed June 27, 1996, and whose identity must remain undisclosed pursuant to the Protective Order entered by Chief Judge Penn on September 27, 1995. The INS attorney's affidavit in the record partially contradicted the conclusions reached by the Court in its Memorandum Opinion and Order of June 27, 1996.

The defendants moved, before and at the hearing, for a full evidentiary hearing on the merits of the above-captioned case on the ground that the testimony of various witnesses must be assessed in order to determine the agreement's terms. This testimony was made a part of the record today by the government and does not alter the Court's conclusions herein.

Furthermore, the "discrepancies" complained of in the testimony of the various witnesses either do not relate to issues that would effect the outcome of this case or do not conflict with what was stated in the Court's Memorandum Opinion of June 27, 1996. In a non-jury trial, the Court may make

derivative inferences from undisputed facts as long as those inferences do not depend on the evaluation of witness credibility. *Cook v. Babbitt*, 819 F. Supp. 1, 11 n.11 (D.D.C. 1993) (Lamberth, J.). Also, the Court need not credit testimony to the extent that it is too incredible to be believed. *Minor v. Washington Terminal Co.*, 180 F.2d 10 (D.C. Cir. 1950).

Moreover, all the witnesses, with the exception of the INS attorney, were deposed and subject to cross-examination, which appears in the record. The INS attorney is the only witness for either side that was unavailable to be deposed during the discovery period. Thus, she is the only witness whose testimony was not, and could not have been, challenged through cross-examination. The Court already has examined the deposition testimony of the other witnesses who were extensively cross-examined. As the ultimate factfinder in this non-jury case, the Court may, in its discretion, refuse to take oral testimony that would merely be redundant of the transcripts already in the voluminous record. In order to avoid needless further expense, delay, and burden on the parties and the Court, the Court shall exercise its discretion not to hear redundant testimony. The Court holds that a full bench trial is unnecessary because, but for the testimony of the INS attorney, this case has been fully adjudicated on the submitted record.

With respect to the merits of the above-captioned case, upon consideration of the testimony taken pursuant to Rule 43(e) and of the entire record herein, as the Court announced from the bench at the conclusion of the hearing today, the Court holds that the government is bound by its agreement entered into with the plaintiff, with the approval of the AUSA, the DEA Agent, and the INS District Director. The agreement is that, in exchange for the plaintiff's cooperation with the government in its effort to prosecute Latin American drug dealers and for the plaintiff's testimony with respect thereto, she would not be subject to deportation. The Court finds that the plaintiff fully complied in all material and essential respects with the agreement. In accordance with the plaintiff's due process rights guaranteed by the United States Constitution, the

Court shall order specific performance of this agreement by the government. Furthermore, the Court finds that the government is estopped from denying the existence of the agreement and thus deporting the plaintiff. The government promised and lead the plaintiff to believe it promised that she would not be deported after testifying against dangerous Latin-American drug dealers. That she believed she would not be deported was imminently reasonable. She reasonably relied on that promise and cooperated with the government to her detriment. Moreover, there is no evidence that the government did anything to dispel her reasonable belief.

Based on fundamental due process considerations, principles of estoppel, and the entire record herein, based on the facts as articulated by the Court, and based on today's hearing and the Court's Memorandum Opinion of June 27, 1996, it is, by the Court this 3d day of July, 1996,

ORDERED that the government entered into a legal and binding agreement with the plaintiff not to deport her in exchange for her cooperation; and it is

FURTHER ORDERED that the government and its agents shall take any and all reasonable steps necessary to restore the plaintiff's status as a permanent resident of the United States consistent with this Opinion; and it is

FURTHER ORDERED that a redacted version of the transcript of today's hearing shall be made available to the *Washington Post* and to the public as soon as it is provided to the Court by the Court's reporter and approved for release by counsel for both the plaintiff and the government. The Court notes that it has been advised that there are serious security and privacy concerns that require this action on the part of the Court.

/s/_____

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 95-01851 (CRR)

MARLENA RAMALLO,

Plaintiff,

v.

JANET RENO, *et al.*,

Defendants.

Filed and Decided on July 23, 1996

SUPPLEMENTAL MEMORANDUM OPINION OF
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

The Court has before it a Request by the government for Clarification of the Court's July 3, 1996 Order. The government broadly requests whether the Court found the agreement between the plaintiff and the government to include the restoration of the plaintiff's previous status as a Lawful Permanent Resident of the United States with its attendant rights such as, for example, the right to travel to and from the country. Also, the government asks whether the Court's ruling was a ruling on the plaintiff's Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure or was a Judgment as a result of findings on the record as to the merits of the case.

As to the first issue, the Court clearly found that the plaintiff and the government, through its agents, servants and/or employees, entered into an agreement, in exchange for her testimony against numerous drug dealers, that she would not be deported and that she would be restored to her previous status as a Lawful Permanent Resident with all the rights thereunto appertaining. That finding clearly is supported by the testimony, exhibits, and the entire record, and is expressed in the various prior Orders of this Court.

As to the second issue, the Court used Rule 43(e) of the Federal Rules of Civil Procedure because the government had in reality controverted through only one witness the agreement mentioned above. The Court also advised both counsel that, but for that one witness, it could have granted summary judgment without the Rule 43(e) hearing, as the Court, in a matter to be tried before the Court without a jury, may draw reasonable inferences on a summary judgment motion. *Fox v. Johnson & Wimsatt, Inc.*, 127 F.2d 729, 737 (D.C. Cir. 1942); *Connors v. Incoal, Inc.*, 995 F.2d 245, 251 (D.C. Cir. 1993); *Cook v. Babbitt*, 819 F. Supp. 1, 11, n.11 (D.D.C. 1993). *See also Minor v. Washington Terminal Co.*, 180 F.2d 10 (D.C. Cir. 1950). The additional testimony of the witness, who appeared before the Court on July 3, 1996, made it abundantly clear that the witness's prior affidavit was incomplete, to say the least, and, in any event, the witness's testimony proved not only the existence of the agreement as outlined above, but this particular witness's opinion and wish that the plaintiff would not and should not be deported for her own safety. Thus, at the conclusion of the Rule 43(e) hearing, it was clear to the Court that the plaintiff was entitled to summary judgment and judgment on the merits.

Furthermore, at the end of the Rule 43(e) hearing, the government proffered all of its exhibits into evidence as if at trial. The plaintiff's attorney did not object and the Court received this evidence. Accordingly, the Court, in its Opinion and Order of July 3, 1996, intended alternatively to issue its findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, since the government put forward its evidence in affidavit/declaration form, which, without cross-examination, buttressed the plaintiff's claim on the merits. *See generally* Charles R. Richey, *A Modern Management Technique for Trial Courts to Improve the Quality of Justice: Requiring Direct Testimony to be Submitted in Written Form Prior to Trial*, 72 Geo. L.J. 1 (1983); *see also* Manual for Complex Litigation, Third, Federal Judicial Center, at 160 (1995). Accordingly, the Court intended that its Judgment be rendered on the plaintiff's

Motion for Summary Judgment pursuant to Rule 56, as well as pursuant to Rule 52(a).

By way of further explanation, so that the defendant will be crystal clear, Rule 611(a) of the Federal Rules of Evidence permits the Court to control the manner and mode of the examination of witnesses and the presentation of evidence. This rule must be read in the context of this case and in relation to the express authority conferred upon the Court pursuant to Rule 43(e) of the Federal Rules of Civil Procedure as well as the inherent power of the Court.

CONCLUSION

The Court shall adopt the plaintiff's proposed order, with the exception of the last 11 words. The Court assumes that if the plaintiff wishes to travel outside the United States or to seek employment in the future, a green card would entitle her to do so. The Court has determined that an agreement as outlined above existed. In view of the foregoing, the Court shall issue an order directing the government to take all reasonable steps necessary to effectuate the agreement through the appropriate means. The Court is hopeful that this matter now can be put to an end, once and for all.

July 23, 1996

/s/_____

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 95-01851 (CRR)

MARLENA RAMALLO,

Plaintiff,

v.

JANET RENO, *et al.*,

Defendants.

Decided July 23, 1996

ORDER

For the reasons expressed in the Court's Supplemental Memorandum Opinion of even date herewith, it is, by the court, this 23rd day of July, 1996

ORDERED that the defendants' Motion for Clarification shall be and hereby is, GRANTED; and it is

FURTHER ORDERED that the government and its agents shall take any and all reasonable steps necessary to restore plaintiff's status as a Lawful Permanent Resident (or "LPR") of the United States, together with all of the rights and privileges accorded an LPR including, but not limited to, the right to unrestricted travel outside the United States and the right to a "green card."

/s/_____
CHARLES R. RICHEY
UNITED STATES DISTRICT
JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1456

MARLENA KENT COOKE,
a/k/a Marien Leonor Ramallo,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Filed November 7, 1995

Order

I have before me, as a single circuit judge, two motions by Marlena Kent Cooke, who may also be known as Marlena Ramallo, the petitioner in this case. The first motion is to seal the certified administrative record, and the second is to hold this case in abeyance.

1. The motion to seal the administrative record shall be, and it hereby is, granted, and the same is sealed until such time as the attorneys for the parties have redacted the same by agreement. The said attorneys will promptly commence such redaction and advise the court when the same has been completed within 30 days of the date of filing of this order.

2. It appearing to me that at one time, at least, in the recent past the government had an agreement with Marlena Kent Cooke that she could apply for a waiver of deportation, or like provision for her to live in the United States, if she were helpful to the government in the prosecution of certain criminal cases. And it further appearing that she may well have, and probably has, lived up to her part of the agreement,

but that the government now opposes a decision on the merits of her application for a waiver of deportation or provision to live in the United States, for some reason which is not clear to me. The said Marlena Kent Cooke has sued the government in the United States District Court for the District of Columbia, seeking to enforce the said agreement, in *Ramallo v. Reno, et al.* No. 1:95CV01851, and on that account seeks to have the proceedings in this case held in abeyance.

I am of opinion Marlena Kent Cook should be permitted to pursue her said case in the district court in the District of Columbia.

It is accordingly ADJUDGED and ORDERED that the proceedings in this case shall be, and they hereby are, held in abeyance pending the outcome of the said case in the District of Columbia, or until the further order of this court.

The attorneys will advise the court each two months as to the status of the proceedings in the said case in the District of Columbia.

/s/ H. E. Widener, Jr.

United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1456

MARLENA KENT COOKE,

Petitioner,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Filed September 12, 1997

Order

I have received the various status reports in this case, the latest of which is enclosed with the government's filing of September 9, 1997.

It appears to me that the judgement of the Court of Appeals for the District of Columbia is not yet final, the same having been stayed. I am thus of opinion that this case should yet be held in abeyance.

It is accordingly ADJUDGED and ORDERED that the motion of the government to vacate the action of this court, holding this case in abeyance, shall be, and the same hereby is, denied.

/s/ H. E. Widener, Jr.

U.S. Circuit Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE

Immigration Court for Washington, D.C.
901 North Stuart Street, Suite 708
Arlington, VA 22203

A20 619 534

IN THE MATTER OF:
Marlen Kent Cooke
-Respondent-

April 15, 1992

IN DEPORTATION PROCEEDINGS:

CHARGE: Section 241(a)(11) of the Immigration and Nationality Act [hereinafter, the Act]- conviction of conspiracy to violate law relating to a controlled substance

APPLICATION: Leave to file application for waiver of deportability pursuant to Section 212(c) of the Act

APPEARANCES

FOR THE RESPONDENT:

Gerard F. Treanor, Jr., Esq
1201 New York Avenue, NW, #1000
Washington, DC 20005-3917

FOR THE INS:

Dea Sullivan, Esq.
Trial Attorney
Arlington, Va. 22203

WRITTEN DECISION OF THE IMMIGRATION JUDGE

The Respondent appeared before us on March 17, 1992 and requested leave to file an application for relief pursuant to Section 212(c) of the Act. Counsel indicated that the application, form I-191, would be filed with this Court that same day. A deadline of March 24, 1992 was set for the filing of said application. To date an application form I-191 has not been received by the Immigration Court. Accordingly we find that the Respondent has abandoned her intention to file for such relief. The request is therefore denied for lack of prosecution.

The Respondent is the subject of a prior decision by this Court dated May 10, 1988. Our decision on that date was a consent order of deportation, from which both sides waived appeal.

Deportation proceedings were initiated in this case by an order to show cause dated November 21, 1986. A hearing was conducted on April 6, 1988, at which deportability was conceded, and testimony and evidence were presented regarding her request for a waiver of deportability pursuant to Section 212(c) of the Act. At the conclusion of the hearing, it was continued, over the objection of the trial attorney, to accord the Respondent an opportunity to present additional evidence and witnesses. When the hearing reconvened on May 10, 1988, the Respondent withdrew her application for a waiver of deportability pursuant to Section 212(c) of the Act and consented to the entry of an order of deportation. We then entered our decision of May 10, 1988, in which we found the Respondent deportable, as charged, on the basis of her concessions, found that she was making no application for relief from deportation, and ordered her deportation to Bolivia. The Respondent and INS both waived appeal from our order. Accordingly, the order of deportation concerning the Respondent became administratively final on May 10, 1988.

We reopened the proceedings by order dated February 20, 1992 pursuant to the joint motion of new counsel for both sides

who sought reopening to allow the Respondent another opportunity to apply for a Section 212(c) waiver. (The motion to reopen did not concern the issue of deportability, which was conceded.) However, we have now determined that the Respondent is no longer eligible to apply for consideration of a waiver under Section 212(c) of the Act. Domicile in the U.S. after a finding of deportability becomes administratively final can no longer be considered lawful, *Matter of Lok*, 18 I&N Dec. 101 (BIA 1981). When the Respondent's deportation order became administratively final, by her waiver of appeal therefrom, her lawful permanent residence status terminated, *Matter of Lok*, supra. Accordingly she can no longer claim status as a lawful permanent resident. Therefore, she is not presently eligible for a waiver pursuant to Section 212(c) of the Act, as only persons who have lawful permanent status can apply for that relief. In any event, as noted above, the Respondent has failed to prosecute such a request.

Deportability having been established, and there being no application for relief or other matter pending before us in this case, there are no issues remaining before us. This case, therefore, is now ready for a decision. We cancel the future hearing date scheduled in the matter.

ORDER: The respondent's request to be permitted to file for a waiver of deportability pursuant to Section 212(c) of the Act is denied for lack of prosecution and as a matter of law.

FURTHER ORDER: The order of this Court of May 10, 1988, ordering that the Respondent be deported to Bolivia on the charge contained in the Order to Show Cause, is hereby restored to full force and effect.

/s/_____
JOAN V. ARROWSMITH
Immigration Judge

JVA:bil:0035A

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

Falls Church, Virginia 22041

A20 619 534 - Arlington

In re: MARLENA KENT COOKE
a.k.a. Marien Leonor Ramallo
a.k.a Marlen Gomez

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se [1]

ON BEHALF OF SERVICE: Gaylyn N. Boone
General Attorney

CHARGE:

Order: Sec. 241(a)(11), I&N Act [8 U.S.C. § 1251(a)(11)] - Convicted of controlled substance violation

APPLICATION: Waiver of excludability pursuant to section 212(c)

March 10, 1994

Decision the of Board of Immigration Appeals

In a decision dated April 15, 1992, the immigration judge denied the respondent's application for a waiver pursuant to section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent has appealed from that

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[1] The respondent's counsel has submitted a request to withdraw as her representative. This request is granted.

decision. The record will be returned to the Office of the Immigration Judge.

The respondent is a 41-year-old native and citizen of Bolivia. She initially entered the United States in July 1972 as a nonimmigrant visitor. Her status was subsequently adjusted to that of lawful permanent resident on April 4, 1978. On August 1, 1986, she pled guilty to the offense of conspiracy to distribute less than one kilogram of cocaine in violation of 21 U.S.C. § 963. In return for a reduced sentence, she agreed to cooperate fully with federal authorities in their investigation of a related drug-smuggling operation. The respondent was initially sentenced to 18 months incarceration but such term was later modified and she served 5 1/2 months in prison with a 2-year period of probation. In November 1986 the Service issued an Order to Show Cause in her case charging her with deportability under section 241(a)(11) of the Act, 8 U.S.C. § 1251(a)(11), as a result of her criminal conviction. At her deportation hearing on April 6, 1988, the respondent conceded deportability (Tr. at 46) and applied for relief from deportation pursuant to section 212(c) of the Act.

At the hearing in support of the respondent's section 212(c) application for relief, the immigration judge accepted into evidence documentation concerning the respondent's family ties, residence, and other documentation of her eligibility.[2] At the hearing on April 16, 1988, the respondent testified concerning the merits of her case. She stated that she was married at young age in Bolivia and that she had one son, born in 1971, as a result of that marriage. After coming to the United States, she obtained a divorce from her husband. At the time of the hearing in 1988, this son, who had become a permanent resident of the United States, was residing with her. She also had another son born in this country in 1979. She further testified that her mother lived nearby to her in this country as a United States citizen and that she visited her

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[2] The respondent's attorney incorrectly submitted a Form I-601 but the immigration judge accepted it in lieu of the proper Form I-191.

mother frequently and that she was emotionally close to her mother. The respondent also stated that she had a brother residing lawfully in the United States who lived with their mother and at the time of the hearing, the respondent was married to a United States citizen who lived in Texas. Concerning this marriage, the respondent testified that she divided her time primarily between her husband's home in Texas and her own home in Virginia where her children lived. At her hearing, the respondent also testified concerning her criminal conviction. She denied that she ever knowingly used, possessed, sold, or trafficked in cocaine although she admitted she had travelled to Rio de Janeiro, as alleged in the indictment, in the company of individuals who subsequently were convicted of importing cocaine. She acknowledged that she socialized with these persons whose acquaintance she made through the father of her youngest child. She also testified that as a result of her conviction, she assisted government officials in this country in their apprehension of narcotics traffickers. At the conclusion of the April 6, 1998, hearing, the immigration judge granted a brief adjournment for the respondent to obtain the appearance of government officers with whom she had cooperated.

At the resumed hearing on May 10, 1988, the parties entered an agreement concerning the respondent's case. At the hearing, the Service attorney stated that the "respondent is going to withdraw the requested relief under 212(c) and is prepared for an order of deportation from this Court and is also prepared to waive appeal on this case. The Service has agreed that (the respondent) is not going to be taken into custody, that the carryover of the $3,000 bond is sufficient, and that there is an agreement of all the bond is sufficient, and that there is an agreement of all the parties that there will be an additional request made to the district director which is beyond the court's jurisdiction as far as the effect of the order of deportation" (Tr. at 312). As a result of such agreement the immigration judge entered an order on that date finding the respondent deportable as charged and ordering her deported. Both sides waived appeal and no appeal was taken.

On February 10, 1992, the Service moved to reopen deportation proceedings in the respondent's case. In its motion the Service stated that "in the time that has passed since the original order of deportation was entered, the respondent has been extremely helpful to the government of the United States and has provided critical information that has resulted in the successful prosecution of many drug-related cases in the Eastern District of Virginia." The respondent's attorney joined in that motion. As a result, the immigration judge in a decision dated February 20, 1992, reopened deportation proceedings. On March 17, 1992, the immigration judge held a hearing at which she gave the respondent's attorney 1 week to file a Form I-191 in support of the respondent's application for relief from deportation as the record did not contain such application (Tr. at 317). Such application was not submitted and on April 15, 1992, the immigration judge issued a decision denying the respondent's request for section 212(c) relief for lack of prosecution due to her failure to file the required application. In her decision, the immigration judge also denied the requested relief finding that the respondent was not statutorily eligible for such relief. In this regard the immigration judge determined that the respondent was no longer a lawful permanent resident as her status ceased in 1988 when she did not appeal the May 10, 1988, decision finding her deportable and ordering her deported. The respondent now appeals from this April 15, 1992, decision of the immigration judge.

On appeal both parties have disclosed new information not brought to the attention of the immigration judge which has rendered the respondent's case both more interesting and more procedurally complex. The Service, which previously did not oppose reopening, has revealed that it has now changed its position. During the pendency of this appeal, the Service has submitted information of which its attorneys who consented to reopening were apparently unaware. This information, detailed in an affidavit from a Service inspector, reflects that that inspector performed a record search through the United States Customs Service Private Aircraft Enforcement Arrival System on June 9, 1992. From such review, the inspector states that

the respondent was shown to have made seven trips outside the United States from July 5, 1989, until March 29, 1992, on a private aircraft. He further verifies that the respondent is the individual whom he encountered on such aircraft when it arrived in the United States from Nassau on March 29, 1992. On the basis of such information the Service contends that the respondent has executed the 1988 deportation order pursuant to 8 C.F.R. § 243.5. *See also Matter of Solis-Davila*, 13 I&N Dec. 694 (BIA 1971), *aff'd Solis-Davila v. INS*, 456 F.2d 424 (5th Cir. 1972). The Service further maintains that on account of the respondent's departures the subsequent reopening was improper. *Matter of Palma*, 14 I&N Dec. 486 (BIA 1973); *see also Matter of Yih-Hsiung Wang*, 17 I&N Dec. 565 (BIA 1980); *Matter of Estrada*, 17 I&N Dec. 187 (BIA 1979).

For her part, the respondent contends for various reasons that she has continued to retain her lawful permanent resident status and that she is thereby entitled to a new and full hearing concerning her request for section 212(c) relief. Pursuant to a Freedom of Information Act request the respondent has submitted documentation to show that she left the United States after commencement of the original deportation hearing in November 1986. Specifically, the respondent has submitted on appeal a copy of a Notice of Parole/Lookout Intercept which reflects that the respondent applied for admission at Dallas, Texas, on January 5, 1987, and that she was paroled by Service officials there until January 7, 1987. This document reflects that it was sent to Service officials in the Service's Arlington, Virginia, office (where the respondent had been previously placed in deportation proceedings). The excludability ground listed in the parole document was section 212(a)(23) of the Act, conviction of a narcotics law violation, and the document states that the respondent had been "sentenced 8/18/86 to 18 mos. for possession w/intent to distribute cocaine." Although the form contains space to list the disposition of parole, there is no annotation in the parole notice submitted by the respondent. The form submitted, which is an uncertified copy, also apparently reflects deletions as two sections of information - the name of the preparing officer and a section of the remarks -

have been deleted. On the basis of this information, the respondent contends that, as she had not entered the United States, exclusion proceedings were required in her case. She further maintains that, as a result of 1986 departure and subsequent parole, deportation proceedings in her case were improper and the deportation order is of no force and effect as there is no evidence that she had at that time been admitted to the United States.

On appeal the respondent also raises many other arguments to establish her claim that she retains her lawful permanent resident status. The respondent challenges the Service's opposition to reopening of the proceedings at this point as the immigration judge has reopened them and she maintains that the Service can challenge such action only through a motion to reconsider to the immigration judge, not through a motion to dismiss the appeal. The respondent thereby maintains that by reopening the proceedings her status as a lawful permanent resident has been restored. The respondent also objects to the Service motion to dismiss based upon her departures. The respondent maintains that the Service at the time of reopening was aware or should have been aware of her departures and for this reason is now estopped from challenging reopening. The respondent also asserts that the immigration judge's action in reopening also asserts that the immigration judge's action in reopening is res judicata and for this reason also cannot now be contested.

The respondent also maintains that, even if her trips outside the United States after the deportability finding in her case are considered, she is still eligible for section 212(c) relief. In this regard, the respondent asserts that such trips are of no force and effect as her deportation was in violation of law. In this regard she cites *Mendez v. INS*, 563 F.2d 956 (9th Cir. 1977), and maintains that her departures cannot be viewed as execution of the deportation order because on the facts of her case such deportation would be in contravention of law. On this issue the respondent maintains that at the time of the 1988 hearing her attorney and the Service entered into an agreement whereby, in return for her withdrawal of her section 212(c)

application and her acceptance of a final order of deportation, the Service would not enforce her deportation and would permit her to continue to remain in the United States in consideration for her assistance to government officials in their prosecution of drug traffickers. On appeal the respondent has submitted evidence in support of this aspect of her claim. She submitted the affidavit of her former attorney who represented her at the 1988 hearing. This attorney states that it was his understanding that the Service, in return for the respondent's cooperation, would not enforce her deportation order, would permit her to travel outside the United States, would continue her bond, and would quash the deportation order at some future date. To substantiate her claim, the respondent has submitted a copy of the district director's cancellation of the bond in her case, dated April 17, 1989; a letter dated May 14, 1990, from the United States Attorney for the Eastern District of Virginia and from the Drug Enforcement Agency to the district director requesting that the Service, in light of the respondent's cooperation with those authorities in their prosecution of drug traffickers, "continue to allow the respondent) to remain in the United States under whatever terms are acceptable to INS." She also includes in her appeal a copy of earlier correspondence, dated May 18, 1987, from an assistant United States Attorney stating that her involvement in the offense for which she was convicted was 'peripheral' and that she has cooperated with the authorities. With her appeal the respondent also submitted a copy of a memorandum dated May 16, 1990, in her case from the district director to the regional commissioner of the Service concerning a conference attended by Service officials, an attorney from the United States Attorney's office, and the respondent's attorney at that time. This memo states that the United States Attorney's office requested that, in consideration for the respondent's cooperation, she have her legal permanent resident status restored and be permitted to remain in the United States permanently. This memo further states that several options in the respondent's case were discussed including a private bill, deferred action, stay of deportation, and a motion to reopen and

it was decided to request reopening before the immigration judge. On the basis of these facts, the respondent maintains the Service should be estopped from seeking her deportation and that it should be required to honor its part of the agreement concerning her status. The respondent also notes that previously, the Service never confiscated her lawful permanent resident card, never contacted her to surrender for deportation, cancelled her bond, and admitted her without challenge into the United States after her trips outside this country.

On appeal the respondent also asserts that she should be permitted to pursue relief under section 212(c) of the Act because her present situation is the result of the alleged ineffective assistance of her former attorneys. Regarding her 1988 hearing, she alleges that her former counsel did not act appropriately because he did not obtain a clear commitment in writing from the Service to protect her lawful permanent resident status. In support of her claim, she has submitted her affidavit that she did not understand the terms of the agreement and that she relied upon her attorney. In his affidavit her former counsel who represented her at the 1988 hearing states that he did not realize that the respondent's status was questionable as a result of the agreement. She has also submitted an affidavit from an attorney who is an immigration practitioner who asserts that a more experienced attorney would have realized that the respondent need not have abandoned her section 212(c) relief application and need not have accepted a final order of deportation but rather could have pursued deferred action under Operations Instructions § 242.l(a)(22) or termination of the proceedings under 8 C.F.R. 5 242.7(a)(6). Additionally this practitioner avers that the respondent's former attorney should have entered into a written agreement to protect his client. In her appeal the respondent also asserts that she was ineffectively served by the attorney who represented her in 1992 at the reopened hearing as he did not timely submit the section 212(c) application. In her affidavit on this issue the respondent alleges that her attorney forgot to file that application. On this basis she asserts that she

should be accorded a further opportunity to submit such application.

In our assessment of the respondent's claim, we find that the respondent's departures from the United States after the order of deportation was entered in her case are a significant fact whose legal effect is controlling in her case. It is clear that departure from the United States while an order of deportation is outstanding executes that order of deportation. 8 C.F.R. § 243.5; *see also Matter of Solis-Davila, supra.* An alien in such circumstance is considered to have deported in pursuance of law. Id. In such situation the immigration judge and this Board are without jurisdiction to consider a motion to reopen. *Matter of Yih-Hsiung Wang, supra; Matter of Estrada, supra; Matter of Palma, supra; see also* 8 C.F.R. § 3.2. Although the respondent argues that such principles do not apply in her case, we find no merit in her many arguments in support of that claim. The respondent alleges that the Service should have been aware of her departures at the time of reopening but even so we see no reason for the Service's shortcomings to preclude us from now considering them. Moreover the record does not reflect clearly that the Service officials who consented to reopening were knowledgeable concerning her absences and we note also that the record of the trips was apparently maintained by another government agency. The fact that the immigration judge had already reopened the proceedings also does not preclude our consideration of the effect of her departures. The immigration judge's decision does not bind us under principles of res judicata as such principles are applied flexibly, if at all, in administrative proceedings. *Pearson v. Williams*, 202 U.S. 281 (1906); *Artukovic v. INS*, 693 F.2d 894 (9th Cir. 1982); *Matter of Samsen*, 15 I&N Dec. 28 (BIA 1974). In the present case, we are unwilling to apply them as the immigration judge was not aware of the respondent's departures and did not therefore consider their effect. We also find that we may consider their effect in the first instance as such departures concern the jurisdiction of the immigration judge and this Board to hear and decide a case. It is well-established that matters concerning the jurisdiction of a tribunal

is an issue that can properly be considered by this Board in our deciding of a case. *See Matter of Sirhan*, 13 I&N Dec. 592 (BIA 1970) at 594 *and cases cited therein*. Due to the departures of the respondent, the immigration judge and this Board are without jurisdiction to consider the respondent's case. As the immigration judge was without authority to reopen the respondent's case or to consider her motion to reopen, the decision of the judge reopening the proceeding was without force and effect as the decision of a tribunal without jurisdiction is void ab initio and not merely voidable. 21 C.J.S. Courts §§ 115, 116; *see also Johns-Manville Corp. v. U.S.*, 893 F.2d 324 (Fed. Cir. 1989); *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984). On such authority, we may consider the effect of her departure from this country and the order of the immigration judge reopening proceedings did not have, as the respondent argues, the effect of restoring her lawful permanent resident status.

In the respondent's challenge to the legal effect of her departures from this country the respondent argues, citing *Mendez v. INS, supra*, that such departures were not lawful and that as a consequence they should not be considered. She therefore maintains that such departures do not preclude consideration of the motion to reopen in her case. She has cited no authority applicable in her case as it does not arise, as did *Mendez v. INS*, in the United States Court of Appeals for the Ninth Circuit. Moreover, even if we were to consider this argument, it is not shown that the respondent's departures or even their legal effect was in violation of law or the regulations. Rather, the respondent maintains that the Service violated an agreement it had entered into with her whereby it agreed not to enforce her departure and to permit her to depart and reenter the United States. At the outset we find that even if such agreement existed we are powerless to enforce it. The respondent's claim in this regard is similar to an estoppel defense and we have held that we are without authority to apply such equitable doctrine against the Service to preclude it from undertaking a lawful course of action that it is empowered to pursue by statute and regulation. *Matter of Hernandez-*

Puente, Interim Decision 3153 (BIA 1991). Moreover even if we consider this aspect of the respondent's case, we are unwilling to find that the respondent has shown that the terms of the agreement between herself and Service officials were as she claims. The respondent acknowledges in her affidavit that she was not familiar with such terms. The affidavit of her counsel reflects that he did not obtain a firm understanding as to the respondent's case. Most significantly, the Service attorney at the May 1988 hearing stated the agreement for the immigration judge. The right of the respondent to leave the United States and reenter was not mentioned as a term of the agreement. It was specifically stated that in return for withdrawal of the section 212(c) application and the deportation order, the district director would merely consider the respondent's request not to have such deportation order enforced but there was no concession by the Service not to enforce deportation. The respondent's attorney stated that the agreement was as the Service attorney stated and it is not evident from those comments that the Service agreed not to pursue her deportation. We recognize that the respondent had been permitted to reenter the United- States after her departures subsequent to the entry of an order of her deportation but it is not shown that such admissions were pursuant to an agreement.

In her case, the respondent challenges the propriety of the initial hearing in her case. Insofar as the deportation order has been executed by her departures, her challenge is in the nature of a collateral attack. Usually such challenges arise in a criminal proceeding involving illegal reentry after deportation and have been permitted in that context. See *U.S. v. Mendoza-Lopez*, 481 U.S. 828 (1987). Such challenges have also been permitted in subsequent deportation proceeding instituted after reentry after deportation. *Matter of Malone*, 11 I&N Dec. 730 (BIA 1966). The respondent has cited no authority to permit a collateral attack through use of a motion to reopen after deportation and indeed it has been held that a motion cannot be so used. *Matter of Palma, supra*. Even if we were to consider respondent's case on this basis of a collateral attack her claim must fail. The party challenging the prior order must establish

either the prior order was void due to lack of jurisdiction, see *Matter of Sirhan, supra*, or that the prior proceeding resulted in a gross miscarriage of justice, *Matter of Malone, supra*. In the present case, the respondent contends that the immigration judge was without jurisdiction in entering the 1988 deportation order. She maintains that such order was without force and effect because she had departed from the United in December 1987 or January 1988, after commencement of deportation proceedings in November 1987. The respondent further asserts that she was paroled, not admitted into the United States upon her arrival; that the 1988 deportation proceedings were improper; and, that her status should have been determined only in exclusion proceedings. We find no merit in this argument. The respondent must show that the immigration judge lacked jurisdiction by convincing evidence. *See Matter of Sirhan, supra.* She has submitted a copy of a Notice of Parole/Lookout Intercept reflecting that she applied for admission at Dallas, Texas, on January 5, 1987, and that she was paroled until January 7, 1987. In our consideration, we note that that document is not certified in accord with 8 C.F.R. § 287.6 and that, moreover, certain portions of that form appear to be missing or deleted. For such reasons also we are unwilling to find that she has met her burden on this issue. We also note that this form reflects that it was sent to Service officials in Arlington, Virginia, where her deportation proceedings were held. In her hearing testimony, the respondent acknowledged that she reported to such officials, as they required, in January 1988 at which time they took the respondent's passport (Tr. at 308). On such facts we cannot conclude that Service officials were unaware of the respondent's departure during deportation proceedings. It may be that, rather than challenging whether the respondent's 1987 return was an entry under *Rosenberg v. Fleuti*, 374 U.S. 449 (1963); *see also Molina v. Sewell*, 983 F.2d 676 (5th Cir. 1993), (which found that a departure during pendency of deportation proceedings did not necessarily meaningfully interrupt an alien's residence in the United States) they elected to proceed with the deportation proceeding. In any event, the

Notice of Parole, in the absence of any notation regarding the disposition of the respondent's status, does not serve to satisfy her burden.

In our consideration, we also conclude that the respondent has not demonstrated that the prior proceeding constitutes a gross miscarriage of justice which would warrant a collateral attack. Most significantly, the respondent conceded deportability at her original hearing and does not now allege that the deportability finding was improper. She alleges that such prior proceeding was unfair due to the alleged incompetence of her prior counsel and his asserted failure to adequately protect her rights in negotiating an agreement with the Service. We cannot in retrospect find what different agreement, if any, the parties might have negotiated; and, her claim on appeal that a more experienced practitioner would have requested proceedings terminated or would have sought deferred action is highly speculative as it is unclear such relief would have been granted. We find also that it is not evident that the respondent would have been granted section 212(c) relief if no agreement had been reached and if the immigration judge had issued a decision on the merits of that request. For such reasons we find that the respondent has not met her burden in her collateral attack on the prior deportation order which has been executed by her departures.

In our determination we also find that, even if the respondent could successfully attack the prior deportation order which has been executed by her departures, her appeal of the decision of the immigration judge must still fail. The respondent in this appeal alleges that she was denied effective assistance of counsel because she alleges that her prior counsel forgot to timely file the section 212(c) application after her motion to reopen had been granted. We find however that the respondent's claim is not adequately supported. She states in her affidavit that her former attorney neglected to file such application but she has not detailed the agreement between her attorney and herself on this issue. *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988). More significantly, she has not submitted an affidavit from her

former attorney stating his understanding of the agreement he had with his client. Due to such evidentiary deficiencies, we find that the respondent has not demonstrated that her former attorney acted improperly.[3] On such basis, we find that even if we had jurisdiction over the respondent's case, the immigration judge properly denied the respondent's request for lack of prosecution.

In conclusion we find that the respondent, by her departures, has executed the 1988 deportation order and that she cannot now challenge the deportation order in her case. We therefore conclude that we lack jurisdiction over the present appeal and the record shall therefore be returned to the Office of the Immigration Judge without further action.[4]

ORDER: The record is returned to the Office of the Immigration Judge without further action.

/s/ Mary Mcguire Dunne

FOR THE BOARD

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[3] On appeal the respondent contends, in an alternative argument, that the former attorney was not required to submit a Form 1-191 as there had been previously filed a Form 1-601 with regard to the section 212(c) request at the 1988 hearing. The record clearly shows however that the immigration judge upon reopening required that a Form 1-601 be filed as the earlier form was not the proper one (Tr. at 317).

[4] As an additional basis for our finding of lack of jurisdiction, we also note that recent newspaper reports state that the respondent has now again left the United States and gone to Mexico. *See* Washington Post, Monday, February 14, 1994, at D3. If in fact the respondent has left the United States, her departure at this point in the proceedings constitutes a withdrawal of the instant appeal. 8 C.F.R. § 3.4; *see also* 8 C.F.R. § 3.2.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

NO: 94-315-A

MARLENA RAMALLO,
a/k/a Marlena Kent Coooke,

Petitioner,

v.

WILLIAM CARROLL,
District Director, Immigration and
Naturalization Service,

Defendant.

ORDER

This matter came before the Court on the petitioner's motion for a writ of habeas corpus and for reasons stated from the bench, it is hereby

ORDERED that the petition is GRANTED, and upon the posting by the petitioner of bond in the amount of $50,000, with the Clerk of this Court, that William J. Carroll, District Director of the United States Immigration and Naturalization Service, is to forthwith release the petitioner Marlena Ramallo, pursuant to that bond pending a determination of this proceeding.

/s/ Claude M. Hilton
UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
March 14, 1994

A True Copy, Teste:
Doris R. Casey, Clerk

By */s/ J. Solomon*
Deputy Clerk

U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

8 U.S.C. § 1105(a) (PRE-APRIL 1997 AMENDMENT)

§ 1105a JUDICIAL REVIEW OF ORDERS OF DEPORTATION AND EXCLUSION--EXCLUSIVENESS OF PROCEDURE

(a) The procedure prescribed by, and all the provisions of sections 1031 to 1042 of Title 5, shall apply to, and shall be the sole and exclusive procedure for, the judicial review of all final orders of deportation heretofore or hereafter made against aliens within the United States pursuant to administrative proceedings under section 1252(b) of this title or comparable provisions of any prior Act, except that--

8 U.S.C.A. § 1252(g) (1997)

§ 1252. JUDICIAL REVIEW OF ORDERS OF REMOVAL

(g) Exclusive Jurisdiction.

Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT 0F 1996, PUB. L. NO. 104-208, § 306(c), 1996 U.S.C.C.A.N. (110 STAT. 3009) 612

§ 306. APPEALS FROM ORDERS OF REMOVAL (NEW SECTION 242)

(c) EFFECTIVE DATE.--

(1) IN GENERAL.--Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply to all final orders of deportation or removal and motions to reopen filed on or after the date of the enactment of this Act and subsection (g) of section 242 of the Immigration and

Nationality Act (as added by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

(2) LIMITATION.--Paragraph (1) shall not be considered to invalidate or to require the reconsideration of any judgment or order entered under section 106 of the Immigration and Nationality Act as amended by section 440 of Public Law 104-132.

ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996, PUB. L. NO. 104-208, § 309(a), 1996 U.S.C.C.A.N. (110 STAT. 3009) 625

§ 309. EFFECTIVE DATES; TRANSITION.

(a) IN GENERAL.—Except as provided in this section and sections 303(b)(2), 306(c), 308(d)(2)(D), or 308(d)(5) of this division, this subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act (in this title referred to as the "title III-A effective date").

ILLEGAL IMMIGRATION REFORM AND IMMIGRANT RESPONSIBILITY ACT OF 1996, PUB. L. NO. 104-208, § 309(c), 1996 U.S.C.C.A.N.(110 STAT. 3009) 625-27

§ 309. EFFECTIVE DATES; TRANSITION.

(c) TRANSITION FOR ALIENS IN PROCEEDINGS.--

(1) GENERAL RULE THAT NEW RULES DO NOT APPLY.—Subject to the succeeding provisions of this subsection, in the case of an alien who is in exclusion or deportation proceedings as of the title III--A effective date--

(A) the amendments made by this subtitle shall not apply, and

(B) the proceedings (including judicial review thereof) shall continue to be conducted without regard to such amendments.

(2) ATTORNEY GENERAL OPTION TO ELECT TO APPLY NEW PROCEDURES.---In a case described in paragraph (1) in which an evidentiary hearing under section 236 or 242 and 242B of the Immigration and Nationality Act has not commenced as of the title III--A effective date, the Attorney General may elect to proceed under chapter 4 of title II of such Act (as amended by this subtitle). The Attorney General shall provide notice of

such election to the alien involved not later than 30 days before the date any evidentiary hearing is commenced. If the Attorney General makes such election, the notice of hearing provided to the alien under section 235 or 242(a) of such Act shall be valid as if provided under section 239 of such Act (as amended by this subtitle) to confer jurisdiction on the immigration judge.

(3) ATTORNEY GENERAL OPTION TO TERMINATE AND REINITIATE PROCEEDINGS.--In the case described in paragraph (1), the Attorney General may elect to terminate proceedings in which there has not been a final administrative decision and to reinitiate proceedings under chapter 4 of title II the Immigration and Nationality Act (as amended by this subtitle). Any determination in the terminated proceeding shall not be binding in the reinitiated proceeding.

(4) TRANSITIONAL CHANGES IN JUDICIAL REVIEW.--In the case described in paragraph (1) in which a final order of exclusion or deportation is entered more than 30 days after the date of the enactment of this Act, notwithstanding any provision of section 106 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act) to the contrary—

(A) in the case of judicial review of a final order of exclusion, subsection (b) of such section shall not apply and the action for judicial review shall be governed by the provisions of subsections (a) and (c) of such in the same manner as they apply to judicial review of orders of deportation;

(B) a court may not order the taking of additional evidence under section 2347(c) of title 28, United States Code;

(C) the petition for judicial review must be filed not later than 30 days after the date of the final order of exclusion or deportation;

(D) the petition for review shall be filed with the court of appeals for the judicial circuit in which the

administrative proceedings before the special inquiry officer or immigration judge were completed;

(E) there shall be no appeal of any discretionary decision under section 212(c), 212(h), 212(i), 244, or 245 of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act);

(F) service of the petition for review shall not stay the deportation of an alien pending the court's decision on the petition, unless the court orders otherwise; and

(G) there shall be no appeal permitted in the case of an alien who is inadmissible or deportable by reason of having committed a criminal offense covered in section 212(a)(2) or section 241(a)(2)(A)(iii), (B), (C), or (D) of the Immigration and Nationality Act (as in effect as of the date of the enactment of this Act), or any offense covered by section 241(a)(2)(A)(ii) of such Act (as in effect on such date) for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 241(a)(2)(A)(i) of such Act (as so in effect).

(5) TRANSITIONAL RULE WITH REGARD TO SUSPENSION OF DEPORTATION.-- Paragraphs (1) and (2) of section 240A(d) of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to notices to appear issued before, on, or after the date of the enactment of this Act.

(6) TRANSITION FOR CERTAIN FAMILY UNITY ALIENS.--The Attorney General may waive the application of section 212(a)(9) of the Immigration and Nationality Act, as inserted by section 301(b)(1) of this division, in the case of an alien who is provided benefits under the provisions of section 301 of the Immigration Act of 1990 (relating to family unity).

(7) LIMITATION OF SUSPENSION OF DEPORTATION.—The Attorney General may not suspend the deportation and adjust the status under section 244 of the Immigration and Nationality Act of more than 4,000 aliens in any fiscal year (beginning after the date of the enactment of this Act). The previous sentence shall apply regardless of when an alien applied for such suspension and adjustment.

Supreme Court, U.S.
FILED
JAN 30 1998

No. 97-526

In the Supreme Court of the United States

OCTOBER TERM, 1997

MARLENA RAMALLO, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
LAURA M. FRIEDMAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

25 pp

QUESTIONS PRESENTED

1. Whether Section 242(g) of the Immigration and Nationality Act (INA), as amended by Section 306(a) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), barred the courts below from exercising jurisdiction over petitioner's claim that her deportation, in violation of an alleged agreement with the government not to deport her, would violate due process.

2. Whether Section 242(g) of the INA, as amended by Section 306(a) of IIRIRA, bars courts from exercising jurisdiction over claims for relief that were pending in the courts on the date of IIRIRA's enactment.

3. Whether, in light of its conclusion that Section 242(g) bars the exercise of jurisdiction over petitioner's claim for relief, the court of appeals had the authority to vacate the district court's order and to remand with instructions to dismiss for lack of jurisdiction.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-526

MARLENA RAMALLO, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is reported at 114 F.3d 1210. The opinion of the district court denying the government's motion to dismiss for lack of jurisdiction (Pet. App. 14-28) is reported at 918 F. Supp. 11. The opinion of the district court denying both parties' motions for summary judgment (Pet. App. 29-54) is reported at 931 F. Supp. 884. The order of the district court granting relief to petitioner (Pet. App. 56-58) is reported at 934 F. Supp. 1. The district court's supplemental opinion on respondent's motion for clarification (Pet. App. 59-61) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1997. A petition for rehearing was denied on

August 8, 1997. Pet. App. 10. The petition for a writ of certiorari was filed on September 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Bolivia who entered the United States in 1972 and became a lawful permanent resident in 1978. In 1986, pursuant to a plea agreement with the United States Attorney's Office for the Eastern District of Virginia, petitioner was convicted of conspiracy to import cocaine into the United States, in violation of 21 U.S.C. 963. As part of the plea agreement, petitioner agreed to assist in the investigation and prosecution of drug traffickers. Petitioner was sentenced to a term of 18 months' imprisonment, of which she served 5-1/2 months. Pet. App. 3, 15.

Upon her release from prison, the Immigration and Naturalization Service (INS) issued an Order to Show Cause against petitioner, charging her with deportability based on her drug conviction. Pursuant to an agreement with the government (deportation agreement), petitioner conceded deportability, withdrew her request for discretionary relief from deportation under Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1982), and waived her right to appeal the decision of the immigration judge (IJ).[1] In exchange for the fore-

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[1] Before its repeal in 1996, Section 212(c) authorized the Attorney General, in her discretion, to waive the deportation of certain aliens lawfully admitted for permanent residence who had lived in this country for seven consecutive years. See 8 U.S.C. 1182(c) (1994). Because of 1996 legislation, however, the Attorney General no longer has the authority to grant

going and her continued cooperation with the Drug Enforcement Administration (DEA) after completion of the plea agreement, the government agreed to allow petitioner to stay in the country while she cooperated.[2] Pet. App. 3-4. Consistent with the terms of the agreement, the IJ, on May 10, 1988, ordered petitioner deported. Also consistent with the agreement, however, the INS did not immediately take steps to deport petitioner. *Id.* at 16. Petitioner pro-

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petitioner relief under Section 212(c). Section 440(d) of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1277, amended Section 212(c) to exclude from the scope of its discretionary waiver provision "an[y] alien who is deportable by reason of having committed any criminal offense covered in section 241(a)(2) * * * (B)" of the INA (previously codified at 8 U.S.C. 1251(a)(2)(B) (1994)), which refers to convictions for controlled substance offenses. Because petitioner was convicted of a controlled substance offense and is deportable on that basis, she is no longer eligible for Section 212(c) relief.

Section 212(c) was repealed by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, as of IIRIRA's effective date (Apr. 1, 1997), and was replaced with a new form of discretionary relief termed "cancellation of removal." See 8 U.S.C. 1229b (Supp. II 1996) (added by IIRIRA § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597). That new authority does not apply "in the case of an alien who is in exclusion or deportation proceedings before" April 1, 1997. See IIRIRA § 309(c)(1), 110 Stat. 3009-625, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(2), 110 Stat. 3657. And petitioner would not be eligible for cancellation of removal any way because of her drug-importation offense. See INA §§ 101(a)(43)(B), 240A(a)(3) (as amended by IIRIRA), 8 U.S.C. 1101(a)(43)(B), 1229b(a)(3) (1994 & Supp. II 1996).

[2] Petitioner contends that the government agreed to permit her to remain in the United States permanently. Pet. App. 3.

vided cooperation to the government in the investigation and prosecution of drug traffickers. *Id.* at 16-17.

On February 10, 1992, the INS filed a motion to reopen the deportation proceedings so that petitioner could have the opportunity to reapply for relief from deportation under Section 212(c). The IJ granted the request to reopen, but petitioner failed to file any application for Section 212(c) relief. On April 15, 1992, the matter was dismissed for lack of prosecution. Pet. App. 4.[3]

Petitioner appealed the IJ's dismissal to the Board of Immigration Appeals (BIA or Board). Petitioner contended that the government had breached its deportation agreement with her, and that she had received ineffective assistance of counsel at her original deportation hearing. The INS moved to dismiss petitioner's appeal for lack of jurisdiction based on her numerous and unapproved departures from the United States while her final order of deportation was outstanding.[4] As petitioner did not dispute that she had left the country after entry of

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[3] The IJ also found that petitioner was ineligible for Section 212(c) relief because, as a result of the final order of deportation issued against her, she was no longer a "lawful permanent resident" eligible for such relief. Pet. App. 68.

[4] Under the immigration laws as in effect at the time, an alien who left the country while under a final order of deportation "self deported" and thereby eliminated any right to further administrative or judicial review of her deportation order. See 8 U.S.C. 1101(g); 8 U.S.C. 1105a(c) (1994) (repealed by IIRIRA § 306(b), 110 Stat. 3009-612); 8 C.F.R. 243.5. The INS learned of petitioner's departures only after it had agreed to move to reopen her deportation proceedings. See Pet. App. 17.

her deportation order, the BIA dismissed her case as unreviewable. Pet. App. 17-18, 82. The Board also found that petitioner had not shown that her deportation agreement with the government permanently protected her from deportation. *Id.* at 79. Petitioner then filed a petition for review of the Board's decision in the United States Court of Appeals for the Fourth Circuit. The case in the Fourth Circuit has been held in abeyance pending the resolution of the present litigation. *Id.* at 63-65.

2. In September 1995, petitioner filed a complaint in the United States District Court for the District of Columbia. She requested that the court declare her order of deportation null and void, enjoin the government from executing that order, and grant specific performance of the alleged terms of the deportation agreement (permanent protection from deportation and the grant of status of a lawful permanent resident). The government moved to dismiss the case based on lack of subject-matter jurisdiction, and both parties moved for summary judgment on the merits. Pet. App. 4.

On January 29, 1996, the district court ruled that it had subject-matter jurisdiction to hear petitioner's claims. Pet. App. 14-26.[5] On June 27, 1996, the court

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[5] In particular, the district court rejected the government's argument that its jurisdiction was precluded by 8 U.S.C. 1105a(a) (1994) (repealed by IIRIRA § 306(b)), which provided that judicial review of all orders of deportation must be sought in the courts of appeals. The court concluded that "[petitioner's] complaint does not challenge the validity of the deportation order or a determination made in the deportation proceedings. * * * Rather, [petitioner] alleges breach of an agreement and violation of her Fifth Amendment rights due to the alleged breach. [Petitioner] seeks specific enforcement of

denied both parties' motions for summary judgment, and scheduled an evidentiary hearing. See *id.* at 30, 36. On July 3, 1996, after that hearing, the district court granted petitioner's motion for summary judgment, which it had previously denied. *Id.* at 56-58. The court found that "the government is bound by its agreement entered into with [petitioner]." *Id.* at 57. That agreement, the court concluded, "is that, in exchange for [petitioner's] cooperation with the government in its effort to prosecute Latin American drug dealers and for [petitioner's] testimony with respect thereto, she would not be subject to deportation." *Ibid.* The court enjoined the government from deporting petitioner and directed the government to restore her to the status of a lawful permanent resident. *Id.* at 57-58.

3. On September 30, 1996, President Clinton signed into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. Section 306(a)(2) of IIRIRA, 100 Stat. 3009-607, amends Section 242 of the INA to include the following provision:

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the agreement, by which the government allegedly is obligated to ensure that [she] may remain in this country, regardless of a finding of deportability or an order of deportation and independent of the administrative deportation proceedings." Pet. App. 24-25. The government disagrees with that characterization of petitioner's claim for relief.

> (g) Exclusive jurisdiction
>
> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

8 U.S.C. 1252(g) (Supp. II 1996). Section 306(c)(1) of IIRIRA further provides that Section 242(g) of the amended INA "shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under [the INA]." 110 Stat. 3009-612.

4. The government appealed the district court's decision to the United States Court of Appeals for the District of Columbia Circuit. The government argued, among other things, that, after the enactment of Section 242(g) in IIRIRA, the courts clearly lacked jurisdiction to hear petitioner's claim, because that claim arose from "the decision or action by the Attorney General to * * * execute [a] removal order[]" against her. The court of appeals agreed with the government that IIRIRA "now undisputably deprives both courts of appeals and district courts of jurisdiction" to hear petitioner's claim, because that claim arises from the Attorney General's decision or action "to execute a removal order against [petitioner]." Pet. App. 5-6.

The court of appeals also determined that it retained appellate jurisdiction sufficient to vacate the district court's decision. Pet. App. 6-7. The court observed that, unless it had jurisdiction to dispose of

the case in that manner, the decision of the district court in a matter outside its statutory jurisdiction would escape review entirely, a result Congress had not intended in amending the INA. *Ibid.* The court analogized its action to "an appellate court's jurisdiction when a case becomes moot between the time a district court judgment is entered and the time it arrives at the appellate court for review." *Ibid.* Although the court observed that its action deprived petitioner of one forum for her constitutional claim, it noted that the government had "concede[d]" that habeas corpus review remains available for substantial constitutional claims. *Id.* at 8.[6]

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[6] At oral argument in this case, the attorney for the government stated, "Well, really constitutional habeas jurisdiction continues to exist. Correct, this Court has constitutional habeas jurisdiction, and would continue to have that jurisdiction to correct substantial constitutional errors." Tr. C.A. Oral Arg. 10-11. The government attorney did not state that a *district court* would have jurisdiction to issue a writ of habeas corpus; rather, the government's position was that the courts of appeals have authority to review a deportation order for substantial constitutional error. See *id.* at 13-14; cf. *Felker* v. *Turpin*, 116 S. Ct. 2333 (1996) (holding that Congress has not foreclosed Supreme Court's consideration of original habeas corpus petitions).

Since the decision below was issued, the government has further clarified its position on the availability of the writ of habeas corpus with respect to matters arising under the INA, in connection with pending litigation in the Second Circuit. See *Mojica* v. *Reno*, 970 F. Supp. 130 (E.D.N.Y. 1997), appeals pending, Nos. 97-2599 and 97-2600 (2d Cir.); *Yesil* v. *Reno*, 958 F. Supp. 828, recons. denied, 973 F. Supp. 372 (S.D.N.Y. 1997), appeal pending, No. 97-2629 (2d Cir.). The government's position is that, as a general rule, a petition in district court for a writ of habeas corpus is not the avenue by which an alien may raise a constitutional challenge to her deportation. Rather,

DISCUSSION

1. The court of appeals in this case correctly held that Section 242(g) of the Immigration and Nationality Act (INA), 8 U.S.C. 1252(g) (Supp. II 1996), expressly bars district court jurisdiction over petitioner's action, which was brought to raise, *inter alia*, a claim that her deportation in contravention of a purported agreement with the government would violate the Constitution. As petitioner points out (Pet. 10-12), however, in *American-Arab Anti-*

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such an alien may and must present her constitutional claim to the court of appeals on petition for review of a deportation order or (as in this case) on petition for review of the denial of a motion to reopen a deportation order. See 8 U.S.C. 1252(a)(1) (Supp. II 1996); see also IIRIRA § 306(b) (repealing 8 U.S.C. 1105a(a) (1994)), which previously authorized habeas corpus proceedings for aliens held in custody). Petitioner currently has a petition for review pending in the Fourth Circuit, see Pet. App. 63-65, and in our view that court has jurisdiction to entertain any claim of fundamental constitutional error raised by petitioner. In the rare case in which there might be unresolved factual issues bearing on the constitutional claim, the court of appeals may refer the matter to a district court for a hearing pursuant to 28 U.S.C. 2347(b)(3), as incorporated by 8 U.S.C. 1105a(a) (1994) (repealed by IIRIRA § 306(b)) and 8 U.S.C. 1252(a)(1) (Supp. II 1996). But see *American-Arab Anti-Discrimination Committee* v. *Reno*, 119 F.3d 1367, 1373 (9th Cir. 1997) (holding that such references from courts of appeals to district courts are not available on judicial review of final orders of deportation, and therefore aliens should be able to seek relief in district court in first instance). To the extent that the Seventh Circuit's decision in *Turkhan* v. *INS*, 123 F.3d 487 (1997), may be read to hold that the courts of appeals are absolutely without jurisdiction to entertain constitutional challenges to deportation orders brought by aliens who have been found deportable based on a conviction for an aggravated felony, we do not agree with that decision.

Discrimination Committee, 119 F.3d 1367 (1997) (*AADC*), the Ninth Circuit, in contrast to the D.C. Circuit in this case, has not applied Section 242(g) according to its express terms, and has allowed a constitutionally based district court challenge to deportation proceedings to continue. For that reason, and because the issue of district court jurisdiction is one of recurring importance under the Immigration and Nationality Act (INA),[7] we agree with petitioner that that jurisdictional issue warrants review by this Court.

We have today filed a petition for a writ of certiorari to review the decision of the Ninth Circuit in *AADC*. See *Reno* v. *American-Arab Anti-Discrimination Committee*, petition for cert. pending, No. 97-1252 (filed Jan. 30, 1998).[8] We explain in the certiorari petition in *AADC* that Section 242(g) of the INA was enacted as part of IIRIRA to make absolutely clear what should have been clear all along: that exclusive jurisdiction to review deportation orders lies in the courts of appeals pursuant to the Hobbs Administrative Orders Review Act, 28 U.S.C. 2341-2351, as expressly mandated by the INA itself. See 8 U.S.C. 1105a (1994); 8 U.S.C. 1252 (Supp. II). We also explain why the Ninth Circuit's contrary view fundamentally disrupts the statutory scheme Congress enacted for the expeditious removal of aliens, and why the jurisdictional

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[7] See also *Auguste* v. *Attorney General*, 118 F.3d 723 (11th Cir. 1997); Brief for the United States in Opposition (at 14-17) in *Igbonwa* v. *United States*, petition for cert. pending, No. 97-6518.

[8] We have provided counsel for petitioner in this case with a copy of our petition in *AADC*.

issue warrants review by this Court. See *AADC* Pet. 13-20.

We believe that *AADC* would be a better vehicle than this case for the Court's consideration of the jurisdictional issue. Not only did the Ninth Circuit there decline to apply Section 242(g) according to its terms and allow a district court action to continue, but also the specific basis for the Ninth Circuit's ruling—that the INA's provisions for exclusive jurisdiction in the courts of appeals following entry of a final order of deportation do not bar district court jurisdiction over a First Amendment selective enforcement claim—squarely conflicts with the decision of the Third Circuit in *Massieu* v. *Reno*, 91 F.3d 416 (1996), where the court of appeals ordered the dismissal of a First Amendment selective enforcement claim brought in district court. See *id.* at 418, 426; *Massieu* v. *Reno*, 915 F. Supp. 681, 689 (D.N.J. 1996); *AADC* Pet. 13-15, 20. *AADC* therefore would furnish the Court with an occasion not only to address the general operation of Section 242(g), but also to resolve the question whether an implied exception to the INA's exclusive jurisdictional provisions can be recognized for selective enforcement claims, or even for constitutional claims more broadly. The Court's decision in *AADC* then would, in turn, resolve the jurisdictional issue in this case.

In addition, as we also explain in the certiorari petition in *AADC* (at 21-30), the First Amendment ruling by the Ninth Circuit in that case conflicts with decisions of this Court in a number of respects and substantially interferes with the Executive Branch's ability to enforce the immigration laws and protect the national security, and therefore independently warrants review by this Court. If the

Court were to conclude that a district court does have jurisdiction over a case raising a selective enforcement claim (or constitutional claims more broadly), it could then review the Ninth Circuit's erroneous First Amendment ruling on the merits.

For the foregoing reasons, we suggest that the Court hold the petition in this case pending the disposition of *AADC*.

2. Petitioner further contends (Pet. 13-15) that the court of appeals erred in concluding that the preclusion of judicial review in Section 242(g) of the INA effected by the IIRIRA amendment is applicable to cases such as this one that were pending in the federal courts at the time of IIRIRA's passage. She also argues that the court of appeals' decision on that point is contrary to a decision of the Seventh Circuit, *Turkhan* v. *INS*, 123 F.3d 487 (1997), and to this Court's retroactivity decisions in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 117 S. Ct. 1871 (1997), and *Lindh* v. *Murphy*, 117 S. Ct. 2059 (1997). Those contentions are incorrect; the decision below on the application of Section 242(g) to pending cases is correct, and it does not conflict with any decision of this Court or any other court of appeals.

The court of appeals concluded that Section 242(g), as amended, applied to petitioner's case, even though the case was pending when the statute was amended.[9]

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[9] Petitioner also states (Pet. 15 n.6) that, "[e]ven if Section 242(g) were somehow deemed to apply retroactively, it simply does not cover this case" because this case, in her view, involves a breach of contract and not a decision by the Attorney General to execute a deportation agreement. That argument is without merit. In light of the Board's denial of petitioner's motion to reopen her deportation proceeding and the subsequent efforts of the INS to deport her, the instant action

That construction of the statute is correct. Section 306(a)(2) of IIRIRA amended Section 242 of the INA, 8 U.S.C. 1252, which governs judicial review procedures for deportation cases, and added the exclusive jurisdiction provision in Section 242(g), 8 U.S.C. 1252(g) (Supp. II 1996). Section 306(c)(1) of IIRIRA provides the effective date for INA Section 242(g), which is different from the effective date for the other amended provisions in Section 242. Section 306(c)(1) of IIRIRA provides:

> IN GENERAL.—Subject to paragraph (2), the amendments made by subsections (a) and (b) shall apply as provided under section 309, except that subsection (g) of section 242 of the Immigration and Nationality Act (as amended by subsection (a)), shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act.

IIRIRA § 306(c)(1), 110 Stat. 3009-612, as amended by Act of Oct. 11, 1996, Pub. L. No. 104-302, § 2(1), 110 Stat. 3657. That language clearly states that Section 242(g) applies "without limitation" to *all* cases, regardless of when they were filed.

Section 306(c)(1) of IIRIRA provided that Section 242(g)'s preclusion of review became effective and applicable to pending cases upon the enactment of IIRIRA, September 30, 1996, or, at the latest, on April 1, 1997, IIRIRA's general effective date.[10] Petitioner

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necessarily is one "arising from the decision or action by the Attorney General to * * * execute" petitioner's deportation order.

[10] The Seventh and Ninth Circuits have held that Section 242(g) did not become effective until April 1, 1997, but

argues, however, that the more general transition rule found in Section 309(c)(1) of IIRIRA, prohibiting application of the judicial review amendments to deportation cases commenced before April 1, 1997, applies to Section 242(g). That reading of the statute ignores IIRIRA § 306(c)'s specific exception of INA § 242(g) from IIRIRA § 309. As quoted above, Section 306(c)(1) of IIRIRA separates INA § 242(g) from the other judicial review provisions, and expressly dictates that it shall be applied without limitation to all past and pending cases.

The decision of the court of appeals is consistent with the decision of the Ninth Circuit on this point in *AADC*, *supra*. In that case, although the Ninth Circuit held that the exclusive-jurisdiction provision did not preclude review in the district court of constitutional claims, it did hold that "IIRIRA explicitly provides for the retroactive application of subsection (g)," and that "the provision carves out an exception to the general rule, specified in section 309(c), that IIRIRA does not apply to pending cases." 119 F.3d at 1371. The Ninth Circuit "follow[ed]" the decision of the court below on that point and concluded that "subsection (g) applies retroactively." *Id.* at 1372.

The decision of the Seventh Circuit in *Turkhan* v. *INS*, *supra*, does not conflict with the decision of the court of appeals in this case. In *Turkhan*, the Seventh Circuit held that it lacks jurisdiction to review constitutional claims brought by certain

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that, after that date, courts must apply it to all pending cases. *Lalani* v. *Perryman*, 105 F.3d 334 (7th Cir. 1997); *Fuchslocher* v. *INS*, 110 F.3d 1394 (9th Cir. 1997). As petitioner's case was pending on both September 30, 1996, and April 1, 1997, Section 242(g) applies to her case.

criminal aliens seeking direct review of a deportation order in the court of appeals.[11] In reaching that conclusion, the Seventh Circuit observed that Section 309 of IIRIRA "makes these new judicial review provisions inapplicable to aliens who are in deportation proceedings [before] April 1, 1997." 123 F.3d at 489. The *Turkhan* case, however, did not involve IIRIRA § 306(c)(1), which makes clear that the operation of INA § 242(g) is excepted from the general transition rule in IIRIRA § 309. Indeed, the Seventh Circuit had previously examined IIRIRA § 306(c) in *Lalani* v. *Perryman*, 105 F.3d 334 (1997), and had held there that Section 242(g) is to be applied to all pending cases as of April 1, 1997. *Id.* at 336.[12]

The court of appeals' decision is also consistent with this Court's decisions concerning the application of intervening statutes to pending cases. In *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the Court explained that "intervening statutes conferring or ousting jurisdiction" are ordinarily given immediate effect, "whether or not jurisdiction lay

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[11] To the extent that *Turkhan* may be read to state an absolute rule precluding review even of substantial constitutional claims by the court of appeals, the government does not agree with that decision. In our view, a court of appeals may, on petition for review of a deportation order filed by an alien who has been found deportable based on his criminal conviction of an aggravated felony, review the deportation order for substantial and fundamental constitutional claims. See note 6, *supra*.

[12] The specific issue in *Lalani* concerned whether Section 242(g) became effective upon the date of enactment of IIRIRA, September 30, 1996, or on April 1, 1997, the general effective date for IIRIRA set forth in Section 309(a). That particular issue is moot here because the April 1, 1997, effective date has passed. See note 10, *supra*.

when the underlying conduct occurred or when the suit was filed." *Id.* at 274. "Present law normally governs in such situations because jurisdictional statutes 'speak to the power of the court rather than the rights or obligations of the parties.'" *Ibid.*[13] Thus, a law ousting the courts of jurisdiction applies to pending cases unless there is an express reservation of jurisdiction for those cases. *Bruner* v. *United States*, 343 U.S. 112, 116-117 (1952) ("[W]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law."); see *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 390 (1953) ("When the very purpose of Congress is to take away jurisdiction, of course it does not survive, even as to pending suits, unless expressly reserved."). Congress provided express language dictating Section 242(g)'s application to pending cases, without any reservation. Nothing further is required for it to apply here.

A different result is not suggested by either *Hughes Aircraft* or *Lindh*. *Hughes Aircraft* concerned a statute that created a new cause of action as to certain *qui tam* claims that federal courts previously were barred from hearing and deciding; the Court there concluded that the new statute, conferring power to hear and decide such claims, was not to be applied to pending litigation. The Court in *Hughes Aircraft* cited the holding in *Landgraf* that

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[13] As Justice Scalia also observed in *Landgraf*, the "jurisdiction cases [may be] explained * * * by the fact that the purpose of provisions conferring or eliminating jurisdiction is to permit or forbid the exercise of judicial power—so that the relevant event for retroactivity purposes is the moment at which that power is sought to be exercised." 511 U.S. at 293 (opinion concurring in the judgments).

jurisdictional statutes apply to cases pending at the time of their enactment because they "speak to the power of the court rather than to the rights or obligations of the parties," 117 S. Ct. at 1878 (quoting *Landgraf*, 511 U.S. at 274), but then concluded that the statute at issue in *Hughes Aircraft* was *not* a jurisdictional statute that would be presumptively applicable to pending cases because it spoke "not just to the power of a particular court but to the substantive rights of the parties as well," *ibid.* As the Seventh Circuit explained in *Turkhan*, "*Hughes* tells us only that statutes creating new causes of action—even though phrased in jurisdictional terms—can have prohibited retroactive effects. *Hughes* does nothing to undermine the Supreme Court's holding in *Landgraf*." 123 F.3d at 488 n.3. *Hughes Aircraft* therefore does not control the application of Section 242(g), a jurisdiction-ousting provision concerning the power of the courts, not the substantive rights or obligations of the parties.

Petitioner's reliance on *Lindh* is equally misplaced. The Court in that case found no reason to resort to general principles governing the prospective or retroactive application of statutes (see 117 S. Ct. at 2062-2063) because a thorough contextual analysis of the statute at issue (*id.* at 2063-2068) "reveal[ed] Congress's intent to apply the amendments [in question] only to such cases as were filed after the statute's enactment" (*id.* at 2063). In this case, by comparison, the clarity of IIRIRA's plain language demonstrates that Congress's intent was that Section 242(g) should be applied to pending cases. And to the extent that *Lindh* relied on a negative implication in the statutory provision in question to conclude that the statute did not apply to pending

cases (*id.* at 2068), the decision also does not control this case, for there is no such implication in IIRIRA.

3. In light of its conclusion that Section 242(g) applies to pending cases and bars district court jurisdiction, the court of appeals properly vacated the district court's decision. The court of appeals correctly determined that it possessed residual jurisdiction to prevent the district court's order from escaping appellate review. In Section 242(g), Congress declared that "no court"—including the district courts—shall have jurisdiction over claims such as the one made in this case, except as otherwise provided by law. The court of appeals had the duty to ensure that "no court" in the federal court system acted outside its statutory authority by interfering with the Attorney General's decision to execute a deportation order against petitioner. *Assessor* v. *Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1870); see *Gully* v. *Interstate Natural Gas Co.*, 292 U.S. 16, 18 (1934); *Mansfield, C. & L.M. Ry.* v. *Swan*, 111 U.S. 379, 385-386 (1884). And the court of appeals had express statutory authority to vacate the judgment and remand for entry of an order of dismissal. See 28 U.S.C. 2106.

Petitioner appears to argue that, if Section 242(g) divested all courts, including the courts of appeals, of jurisdiction over pending cases like this one, then the court of appeals lacked authority even to set aside the judgment of the lower court for lack of jurisdiction. But as this Court observed of an analogous issue involving the Article III requirement of a live case or controversy, "reason and authority refute the * * * notion that a federal appellate court may not take any action with regard to a piece of litigation once it has been determined that the requirements of Article III

no longer are (or indeed never were) met. * * * Article III does not prescribe such paralysis." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 21 (1994). Accordingly, this Court has held that vacatur of a lower court's order, with directions to dismiss for mootness, is appropriate when the cause of the mootness is not attributable to either party. See *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267-268 (1936); see generally *Bonner Mall*, 513 U.S. at 25; *Arizonans for Official English* v. *Arizona*, 117 S. Ct. 1055, 1072 (1997). It is appropriate for a court of appeals to take similar action when Congress removes a class of controversies from the statutory jurisdiction of the federal courts. See also *Auguste* v. *Attorney General*, 118 F.3d 723, 727 (11th Cir. 1997) (adopting rationale of decision below with respect to Section 242(g))).

CONCLUSION

With respect to the issue of district court jurisdiction raised by the first question presented in the petition for a writ of certiorari, the petition should be held pending the disposition of *Reno* v. *American-Arab Anti-Discrimination Committee*, petition for cert. pending, No. 97-1252 (filed Jan. 30, 1998), and then disposed of in accordance with the Court's disposition of that case. In all other respects, the petition should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DONALD E. KEENER
ALISON R. DRUCKER
LAURA M. FRIEDMAN
Attorneys

JANUARY 1998

(3)

Supreme Court, U.S.
FILED
FEB 9
CLERK

No. 97-526

IN THE
Supreme Court Of The United States
October Term, 1997

MARLENA RAMALLO,

Petitioner,

vs.

JANET RENO, in her official capacity
and
DORIS MEISSNER, in her official capacity,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

Richard L. Brusca
Counsel of Record
Katharine S. Sexton
Benjamin B. Klubes
Catharine A. Hartzenbusch
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for the Petitioner Marlena Ramallo

Balmar Legal Publishing Services, Washington, DC

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REPLY BRIEF FOR THE PETITIONER

INTRODUCTION

Respondents readily concede that the decision of the District of Columbia Circuit below conflicts with the Ninth Circuit decision in *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367 (9th Cir. 1997), *petition for cert. filed*, __U.S.L.W.__ (U.S. Jan. 30, 1998) (No. 97-1252) ("*American-Arab*"). (Resp'ts Br. in Opp'n at 9-10.)[1] Respondents also admit that whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")

[1] Petitioner cites to the printed version of the Brief for the Respondents, served on February 4, 1998.

impermissibly bars federal court jurisdiction to redress constitutional claims presents an issue warranting Supreme Court review. *Id.* Petitioner wholeheartedly agrees.

Respondents, however, make the rather curious suggestion that this case, which was decided well before the Ninth Circuit denied rehearing in *American-Arab*, should be held in abeyance until Respondents' petition for certiorari in *American-Arab* is resolved. According to the government, *American-Arab* is somehow a "better vehicle" for this Court's consideration of the matters at issue here. (Resp'ts Br. in Opp'n at 11.)

No doubt, Respondents would prefer to present their arguments to this Court against the factual backdrop of *American-Arab*, rather than of this case. After all, *American-Arab* presents the unsympathetic scenario of the government being prevented from deporting alleged terrorists. This case, on the other hand, involves the government's efforts to deport an individual (i) who made an agreement with the government; (ii) who fully cooperated with federal law enforcement authorities in accordance with that agreement; (iii) whose testimony was responsible for the conviction of over 30 dangerous South American drug felons; and (iv) who is likely to be killed if she were deported because of her cooperation and testimony. (Pet. at 4-5.) The government's preference notwithstanding, Ms. Ramallo's petition presents an ideal "vehicle" for this Court to consider the issues raised herein as well as in *American-Arab*.

Furthermore, whether persons, citizen or alien, can rely upon the United States to live up to its agreements with witnesses who provide life-threatening cooperation and testimony in criminal prosecutions is a recurring issue of importance which, Petitioner submits, has more far-reaching implications than the limited factual scenario at issue in *American-Arab*.

Finally, because the respondents in *American-Arab* prevailed before the Ninth Circuit, the likelihood of their supporting the government's petition for certiorari in that case

is remote at best. Here, however, both Petitioner and Respondents *agree* that this Court should review the matters at issue. As a consequence, Petitioner Marlena Ramallo respectfully submits that this Court should grant her petition.[2]

DISCUSSION

A. The Decision Below Conflicts With American-Arab And Is Worthy Of Review.

Respondents clearly and directly agree with Petitioner that this case presents a conflict in the circuits regarding important statutory and constitutional issues. Review of this case is warranted notwithstanding Respondents' eleventh-hour "clarification" of its view on the availability of appellate court habeas corpus review of the constitutional claims of aliens facing deportation. Respondents state that their *current* position on the availability of the writ of habeas corpus with respect to matters arising under the Immigration and Nationality Act ("INA") is that (i) generally it is unavailable; (ii) courts of appeal can, however, hear any substantial constitutional claims pursuant to a petition to review a deportation order; and (iii) any need for development of unresolved facts bearing on a constitutional claim can be referred to a district court for a hearing pursuant to 28 U.S.C. § 2347(b)(3). (Resp'ts Br. in Opp'n at 8 n.6.)

Despite what the government might now contend, however, it is far from certain that the courts ultimately will accept that view. First, it is only the most recent position espoused by Respondents, and, as such, there is no guarantee it will remain their position. Furthermore, no court has adopted this position under the amended INA and there is no reason to believe any court will. To the contrary, at least one federal court, the Ninth Circuit in *American-Arab*, has expressly rejected Respondents' new view of the law.

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[2] Of course, should the Court desire, it can consolidate for argument *American-Arab* or any other case raising issues similar to those raised in this case.

American-Arab, 119 F.3d at 1373 (holding that because the INA limits appellate review to the administrative record, the statute precludes resort to the Section 2347(b) procedure).

More to the point, Respondents' suggestion as to the appropriate procedures for habeas review -- referral to a district court for the taking of additional evidence -- is, in essence, precisely what occurred in this case. Indeed, Respondents note that Ms. Ramallo's petition for review in the Fourth Circuit has been held in abeyance pending the resolution of this case, which was brought in the District Court for the District of Columbia. (Resp'ts Br. in Opp'n at 5.) The Fourth Circuit stayed its proceeding until the district court could conclude its proceeding to develop the factual basis for Ms. Ramallo's constitutional claim. To require the Fourth Circuit to refer the matter to yet *another* district court would entail a gross waste of judicial resources by necessitating that the entire district court proceeding be repeated. That result should not obtain.[3]

B. The Retroactivity Of Section 242(g) Of The INA Remains In Dispute.

Respondents argue that Section 306(c)(1) of the IIRIRA, amending Section 242(g) of the INA (codified at 8 U.S.C. § 1252(g)) applies to pending cases to bar federal court jurisdiction. (Resp'ts Br. in Opp'n at 17-18.) Respondents are incorrect.

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[3] Despite the district court's clear finding to the contrary *Ramallo v. Reno*, 934 F. Supp. 1, 2 (D.D.C. 1996) (Pet. App. at 57), Respondents continue to present their view of the agreement with Ms. Ramallo as follows: "[T]he government agreed to allow petitioner to stay in the country *while she cooperated*." (Resp'ts Br. in Opp'n at 3) (emphasis added). Such a position defies all notions of common sense, and the district court so found. *Ramallo v. Reno*, 934 F. Supp. at 1 (Pet. App. at 58). Ms. Ramallo also takes issue with a number of Respondents' other contentions in their statement of the case. (Resp'ts Br. in Opp'n at 2-8.) Because consideration of these inaccuracies is not necessary for this Court's resolution of the petition, Petitioner will not refute them here.

As an initial matter, that provision could not have barred the district court's jurisdiction in this case because it was not even enacted when that lower court issued its final injunction against the government.[4] It also could not bar the appeal to the D.C. Circuit, not only because the provision was not in effect at the time the appeal was filed, but also because it was the *government*, not Ms. Ramallo, who took that appeal. Thus, under the plain language of Section 242(g), the appeal was not "by or on behalf" of Ms. Ramallo.[5]

Respondents rely on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) to support the decision of the court below. But *Landgraf* itself holds that absent a clear expression of intent, the presumption against applying statutes retroactively requires that it not be used to vitiate valid orders entered by the courts below. *See Landgraf*, 511 U.S. at 280.

This case also provides this Court with a perfect opportunity to explain further its decision in *Landgraf*. Using Section 306(c) as the sole justification for vacating a lower court decision -- which decision was rendered before the statute was passed -- clearly would be retroactive. As Justice Scalia explained in his concurring opinion in *Landgraf*, "applying a jurisdiction-eliminating statute *to undo past*

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[4] Furthermore, Ms. Ramallo could have pressed her claims even before Respondents attempted to deport her to Bolivia, thereby dispatching her to her death. Contrary to Respondents' assertion, Ms. Ramallo's claims do not arise from the decision of the Attorney General to execute the deportation order against her. (Resp'ts Br. in Opp'n at 12 n.9.) Rather, her claims arise from the government's breach of the agreement, which includes, but is by no means limited to, the Attorney General's decision to deport Ms. Ramallo and not to restore her to lawful permanent residence status.

[5] Section 242(g) of the INA, as amended, provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim *by or on behalf* of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

(Pet. App. at 85) (emphasis added).

judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively." *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in judgment) (emphasis added). Here, the circuit court not only applied the statute "prospectively," by finding against its own jurisdiction, but also used it retroactively -- as the only basis for vacating (or "undoing") the injunction issued by the district court. The latter course was improper.

The inconsistent provisions of the IIRIRA regarding its effect on pending cases render congressional intent to revoke jurisdiction, at best, ambiguous.[6] The presumption against retroactivity requires that this statute not be construed to invalidate the district court's order, because the IIRIRA did not expressly state that it is intended to have the retroactive effect of "undo[ing] past judicial action."

C. The Appropriateness Of The Vacatur Of The District Court Decision Independently Warrants Review.

Respondents fail to provide adequate support for the D.C. Circuit's decision to vacate the district court judgment. Significantly, *Auguste v. Reno*, 118 F.3d 723 (11th Cir. 1997), the only case cited by Respondents to justify the specific action taken by the D.C. Circuit here, itself merely cites, without analysis, to the D.C. Circuit's decision in this case. Such a circular citation to authority demonstrates that little, if any, authority supports the D.C. Circuit's decision vacating the district court judgment.

The cases cited by Respondents are not apt. To the contrary, they only stand for the unremarkable proposition

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[6] *Compare* IIRIRA § 306(c)(1) (Pet. App. at 85-86) (stating that the new exclusive jurisdiction provision replacing the repealed 8 U.S.C. 1105(a) shall apply to claims arising from pending deportation proceedings) *with* IIRIRA § 309(c)(1) (Pet. App. at 87) (stating that the amended statute does not apply as a general rule to pending deportation proceedings).

that appellate courts must vacate decrees or judgments of lower courts that *never had* subject matter jurisdiction. *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) (holding that where a trial court never had jurisdiction, an improperly rendered judgment must be reversed by an appellate court); *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 18-19 (1934) (same); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 385-86 (1884) (same). Here, however, the circuit court specifically held that it did not reach the issue of district court jurisdiction. *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997) (Pet. App. at 5). Rather, the circuit court vacated the injunction because it found that *it* did not have jurisdiction to review the district court's injunction. *Id.* at 1213-14. (Pet. App. at 6-7.) Accordingly, the cases cited by Respondents do not provide authority for the D.C. Circuit's vacating the district court judgment in this case.

The statutory provision cited by Respondents, 28 U.S.C. § 2106, begs the question. It simply speaks to the general powers of an appellate court, and not to the appropriate circumstances under which to exercise such powers. Obviously, it does not authorize the circuit court *improperly* to vacate district court judgments. The government knew how to ask for a district court judgment to be vacated, as demonstrated by the government's request in *American-Arab*,[7] but it did not do so here. Instead, the D.C. Circuit issued that relief, *sua sponte*, and in error.

Finally, the government makes a valiant, yet unpersuasive, effort to support the circuit court's "mootness analogy" to justify the vacatur of a presumptively valid district court injunction. The difficulty Respondents face, however, is that this case is not even remotely moot. The IIRIRA does not -- and indeed cannot -- affect Article III jurisdiction by removing statutory jurisdiction from the

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[7] *See American-Arab*, Petition for Certiorari, No. 97-1252 (filed Jan. 30, 1998) at 9 (describing government's request that circuit court vacate district court decision).

courts. Thus, even if the IIRIRA did divest the courts of appeal of statutory jurisdiction, there is no Article III basis to vacate the district court's order.[8]

At bottom, it defies reason to argue, as Respondents do, that the government should be handed a victory and the district court's order summarily should be nullified "to prevent the district court's order from escaping appellate review." (Resp'ts Br. in Opp'n at 18.) To so assert would be akin to a challenger being awarded the heavyweight title because the referee could not make it to the fight. This Court should not endorse such an absurd and inequitable result.

The petition should be granted.

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[8] Even if this Court were to accept the mootness characterization, vacatur still would not necessarily be warranted. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24-25 & n.3 (1994) (suggesting that mootness does not require equitable vacatur where the party seeking relief from the judgment below caused the mootness by voluntary action -- which could include enactment of legislation where the government is a party). Here, the alleged "cause" of the "mootness" was the government's enactment of the IIRIRA. Respondents should not be permitted to disavow responsibility for that legislation and simultaneously take advantage of its jurisdictional provisions.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Ms. Ramallo's petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Richard L. Brusca
Counsel of Record
Katharine S. Sexton
Benjamin B. Klubes
Catharine A. Hartzenbusch
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for the Petitioner Marlena Ramallo

February 9, 1998

Supreme Court, U.S.
FILED
MAR 2 1999
CLERK

No. 97-526

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

MARLENA RAMALLO,
Petitioner,

v.

JANET RENO, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

BRENDAN V. SULLIVAN, JR.
JOHN G. KESTER *
DANE H. BUTSWINKAS
LYNDA SCHULER
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000

* Counsel of Record

Attorneys for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SUPPLEMENTAL BRIEF FOR PETITIONER

On February 24, 1999, this Court decided *Reno* v. *American-Arab Anti-Discrimination Committee,* No. 97-1252. That decision established that 8 U.S.C. § 1252(g), enacted in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), withdrew federal-court jurisdiction of a pending challenge to the Attorney General's decision to "commence [deportation] proceedings, adjudicate cases, or execute removal orders;" and also that IIRIRA did not withdraw federal jurisdiction in pending cases outside those specified categories. Slip Op. 16. Based on that opinion, this judgment should be vacated and the case remanded to the Court of Appeals.

After observing that a "broad understanding" that "treat[s] § 1252(g) as covering all or nearly all deporta-

tion claims" would "create[] an interpretive anomaly," slip op. 7, this Court in *American-Arab* rejected "the unexamined assumption that § 1252(g) covers the universe of deportation claims," *id.* at 11, and held that "[i]n fact, what § 1252(g) says is much narrower," *id.*:

> "The provision applies only to three discrete actions that the Attorney General may take: her 'decision or action' to '*commence* proceedings, *adjudicate* cases, or *execute* removal orders.' (Emphasis added.) There are of course many other decisions or actions that may be part of the deportation process . . . .
>
> "It is implausible that the mention of three discrete events along the road to deportation was a shorthand way of referring to all claims arising from deportation proceedings."

Slip op. 11 (emphasis by the Court). Yet it was on exactly such an "unexamined" and "implausible" expansive reading of § 1252(g) that the decision of the Court of Appeals here depended, in holding that § 1252(g) required vacating a contract decision regarding lawful-permanent-resident status that was not one of the "three discrete events," slip op. 11, to which the statute is limited.

The *American-Arab* decision establishes that the decision of the District of Columbia Circuit to which this petition for certiorari is directed rested on a misunderstanding of § 1252(g). Further, as the petition has shown, if § 1252(g) were held to extend to a contract-enforcement case like this one, that would create issues of retroactivity that the Court of Appeals resolved contrary to this Court's decisions.

I.

The complaint here, as the District Court explained,[1] sought specific performance of a contract by the government similar to a plea bargain, and invoked also estoppel and the Due Process Clause of the Fifth Amendment.[2] The District Court found that in compliance with that agreement petitioner, in exchange for the government's promise to award her lawful-permanent-resident status, had withdrawn a challenge to deportation and had testified as a government witness in criminal prosecutions of major South American drug traffickers, thereby placing her life at risk.[3] P.C.A. 46-47, 50-51, 57-58. Jurisdiction for the

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[1] The District Court pointed out that

> "Here, the plaintiff's Complaint does not challenge the validity of the deportation order or a determination made in the deportation proceedings . . . . Rather, the plaintiff alleges breach of an agreement and violation of her Fifth Amendment rights due to the alleged breach. The plaintiff seeks specific enforcement of the agreement . . . ."

P.C.A. 24. The District Court's decision was not a "review of execution of removal order," *cf. American-Arab*, slip op. at 14. Rather, its order found "that the government entered into a legal and binding agreement with the plaintiff not to deport her in exchange for her cooperation" and directed "that the government and its agents shall take any and all reasonable steps necessary to restore the plaintiff's status as a permanent resident of the United States," P.C.A. 58; see also P.C.A. 62; P.C.A. 19 n.5 (noting that relief against deportation order not sought). (References to "P.C.A." are to the appendix to the petition for certiorari.)

[2] "The United States are as much bound by their contracts as are individuals." *United States* v. *Winstar Corp.*, 518 U.S. 839, 912 (1996) (Breyer, J., concurring), quoting *Sinking Fund Cases*, 99 U.S. 700 (1879); *cf. Santobello* v. *New York*, 404 U.S. 257 (1971) (enforceability of plea agreements).

[3] The government conceded in the Court of Appeals that "Ramallo may be at risk if she returns to Bolivia" and that "she may have some problems" in "arrang[ing] for another country to accept her." Reply Brief for Appellants, U.S.C.A., D.C. Cir., No. 96-5265, at 6-7. The government said that "it is a problem that Ms. Ramallo herself

civil suit rested on 28 U.S.C. § 1361 (action to compel federal official to perform duty owed to plaintiff), and 28 U.S.C. § 1331 (federal question).[4]

The Court of Appeals simply assumed that § 1252(g), which explicitly deals with review of three specified deportation decisions or actions, would in addition deny jurisdiction of a civil suit for specific performance of a contract that did not involve review of a decision to "commence proceedings, adjudicate cases, or execute removal orders." See P.C.A. 6. Without analysis or explanation, the Court of Appeals asserted that the contract action "arises from 'the decision or action' of the Attorney General to execute a removal order against Ramallo." *Id.* But this Court's opinion in *American-Arab* emphasized that § 1252(g)'s withdrawal of jurisdiction in pending cases was *not* all-encompassing, and that the statute's terms "commence proceedings, adjudicate cases, or execute removal orders" were words of limitation that left many other kinds of deportation-related proceedings outside their scope. See slip op. 11. The Court of Appeals did not have available to it this Court's analysis and interpretation of § 1252(g).

II.

The Court of Appeals then extended § 1252(g) even farther, to hold that the statute also mandated retroactive vacatur of a final judgment entered prior to IIRIRA.

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must address," and that "the failure to grant Ramallo the relief she seeks does *not necessarily* mean that she will die." *Id.* at 7 (emphasis supplied).

[4] The civil suit was filed after the Board of Immigration Appeals ruled that "even if such agreement existed we are powerless to enforce it" and "we are without authority to apply such equitable doctrine against the [Immigration and Naturalization] Service." P.C.A. 78; see also P.C.A. 18.

After ruling that "it is clear that this court lacks appellate jurisdiction over the subject matter of this case," P.C.A. 2, nevertheless the Court of Appeals then held that § 1252(g) commanded it to vacate the District Court's judgment. The court reasoned that "we believe that Congress intended to afford this court residual jurisdiction to clear the decks of cases in which the District Court has entered judgment, but in which there can be no review by the Court of Appeals due to its lack of jurisdiction pursuant to IIRIRA." P.C.A. 6.

The Court of Appeals cited no textual language, nor any legislative history, on which to base this ruling.[5] Such reliance on an unexpressed congressional intent to vacate without review a final district-court judgment ignores not only established rules of statutory construction, but also this Court's specific admonition that "we have long embraced a presumption against statutory retroactivity." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 273 (1994). "If the statute would operate retroactively, our tradi-

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[5] The Court of Appeals believed that cases like *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950), in which judgments have been vacated after altered circumstances mooted disputes, furnished adequate authority by analogy. P.C.A. 6. They do not. Nothing about petitioner's contract claim became moot. Also, mootness by "happenstance," 340 U.S. at 40, involves the situation of the parties in a particular case—not a flat withdrawal by Congress for an entire category of cases of the courts of appeals' subject-matter jurisdiction.

Even if mootness rules were thought applicable, they were not followed here. When deciding whether to vacate for mootness, "[t]he principal condition to which we have looked is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 513 U.S. 18, 24 (1994). Yet the Court of Appeals failed completely to perform any analysis like that prescribed in *U.S. Bancorp*, and the parties had not even briefed the issue. And obviously, it was not petitioner who was responsible for the new statute enacted after her judgment against the government.

tional presumption teaches that it does *not* govern absent *clear congressional intent* favoring such a result." *Id.* at 280 (emphasis supplied). No identification of such "clear congressional intent" was even attempted here. The "time-honored presumption" against retroactive legislation is applied "unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 946 (1997). Nothing in *American-Arab*, which reviewed an interlocutory ruling in a case that was still pending in the district court, and which indeed emphasized the narrowness of § 1252(g), suggests otherwise.

This retroactivity construction converted the government's loss in the District Court legislatively into a victory, omitting any review of the merits. To do that was not merely procedural; it "altered the nature or validity of petitioner's rights or the Government's liability." *Bruner* v. *United States*, 343 U.S. 112, 117 (1952). If, as the Court of Appeals believed, § 1252(g) withdrew appellate jurisdiction, then the proper disposition was to dismiss the appeal—not to exercise jurisdiction to take away petitioner's judgment enforcing the government's bargain, relief not obtainable in the INS administrative tribunals. See P.C.A. 18, 78.[6]

American-Arab did not have occasion to address this retroactivity issue, for it examined a court of appeals' interlocutory review of a preliminary injunction. See slip op. 3-4; 119 F.3d at 1370. The District Court here, how-

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[6] *Cf. Ex parte McCardle*, 7 Wall. 506, 514 (1868):

> "What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."

ever, had conducted an evidentiary hearing, made findings of fact and conclusions of law, and entered what it explicitly pointed out was a final decision, upholding and enforcing petitioner's contract claim several months before IIRIRA was enacted. P.C.A. 56-58, 60-61. The government's notice of appeal accordingly invoked 28 U.S.C. § 1291, which is limited to "final decisions of the district courts." Section 1252(g) was applied, not as in *American-Arab* to terminate a pending district-court proceeding, but rather to undo a final judgment already entered by a district court in a civil case that had been concluded.[7] If § 1252(g) were held to apply here, the serious retroactivity issues raised in this petition, and not present in *American-Arab*, would remain. Those issues have been described by one court of appeals, in an opinion cited by the government, Br. Opp. 19, and later superseded, as a "dilemma." *Auguste* v. *Attorney General*, 118 F.3d 723, 727 (11th Cir. 1997), *superseded*, *Auguste* v. *Reno*, 152 F.3d 1325 (11th Cir. 1998).[8]

CONCLUSION

For the reasons stated, certiorari should be granted, the judgment of the Court of Appeals vacated in light of

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[7] Petitioner filed her complaint September 25, 1996. Pet. Cert. 5. The District Court entered its final decision July 3, 1996, P.C.A. 56, with clarifying order July 23, 1996, P.C.A. 62. The government filed its notice of appeal September 4, 1996. Pet. Cert. 7. IIRIRA was enacted September 30, 1996. 110 Stat. 3009.

[8] See also *Auguste* v. *Reno*, 140 F.3d 1373 (11th Cir. 1998), *withdrawn*, 152 F.3d 1325 (11th Cir. 1998); *Henderson* v. *INS*, 157 F.3d 106, 118 n.8 (2d Cir. 1998), *pet'ns for cert. pending*, Nos. 98-996 and 98-1160. *Jean-Baptiste* v. *Reno*, 144 F.3d 212 (2d Cir. 1998), cited the present decision in affirming a district court judgment of dismissal of a challenge to deportation procedures; in that case the district court had entered its judgment after the enactment of IIRIRA, nor did the affirmance deprive the individuals of any relief obtained in district court.

Reno v. *American-Arab Anti-Discrimination Committee*, and the case remanded for appropriate proceedings. Alternatively, certiorari should be granted and the case set for argument.

Respectfully submitted,

BRENDAN V. SULLIVAN, JR.
JOHN G. KESTER *
DANE H. BUTSWINKAS
LYNDA SCHULER
WILLIAMS & CONNOLLY
725 12th Street, N.W.
Washington, D.C. 20005
(202) 434-5000
Attorneys for Petitioner

* Counsel of Record

March 2, 1999